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OF

WASHINGTON

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DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 15291. *En Banc.* December 15, 1919.]

FRED J. WYNNE *et al., Appellants,* v. CORA R. HARVEY, *as Administratrix etc., Respondent.*[1]

EXECUTORS AND ADMINISTRATORS (72, 73)—CLAIMS—PRESENTATION—NECESSITY—PENDING SUIT. Where, pending appeal, the judgment debtor died and the administratrix was substituted, judgment of affirmance was against the administratrix in her representative capacity, and the claim need not be presented within one year; in view of Rem. Code, § 1483, providing that the effect of judgment against any executor shall be to establish the claim in the same manner as if allowed by the executor.

SAME (73). Rem. Code, § 1484, requiring claims to be presented on judgments on which execution has not issued applies only to judgments rendered against the deceased in his lifetime, and not to a judgment of affirmance against the administratrix after she was substituted as appellant (MACKINTOSH, BRIDGES, and FULLERTON, JJ., dissenting).

Appeal from an order of the superior court for Stevens county, Hurn, J., entered December 13, 1918, denying the right to payment of a claim against the estate of a decedent, after a hearing upon objections to the final account of the administratrix. Reversed.

Davis & Heil and *L. B. Donley,* for appellants.

Zent & Jesseph, for respondent.

MOUNT, J. — This appeal is from an order of the lower court denying the right of appellants to have a

[1]Reported in 186 Pac. 310.

judgment paid in due course of the administration of an estate.

The facts are briefly as follows: In the year 1914, appellants, Wynne and wife, commenced an action in the superior court of Stevens county against Lee B. Harvey, I. S. Clark, and others, to recover damages for malpractice in the performance of a surgical operation upon Mrs. Wynne. That action resulted in a judgment against Harvey and Clark in the sum of $5,000. Judgment was entered in April, 1916. Thereafter the defendants in that action, Harvey and Clark, separately appealed to this court. Pending the appeal, Mr. Harvey died, and his wife, who had been appointed administratrix of his estate, was, by an order of this court, substituted as a party appellant. After Mrs. Harvey was appointed administratrix, she published, on the 13th day of January, 1917, a notice to creditors which required all parties having claims against the estate to present the same within one year. At the time of taking the appeal, the judgment against Harvey and Clark was not superseded. After the substitution of Mrs. Harvey as administratrix of the estate of Lee B. Harvey, the case was argued in this court and the judgment was affirmed. See *Wynne v. Harvey*, 96 Wash. 379, 165 Pac. 67. Thereafter the case was heard *En Banc* with the same result. See 99 Wash. 693, 168 Pac. 896. Thereafter the remittitur from this court was filed in the court below on the 3d day of January, 1918, some ten days before the year expired in which to file claims against the estate of Lee B. Harvey. No formal claim of the judgment was presented to the administratrix. Thereafter the administratrix filed her final account, but in that account no mention was made of the judgment against her as administratrix. Exceptions were filed to the account, these exceptions were heard, and the trial court was

of the opinion that, because the claim upon the judgment was not presented to the administratrix within one year after the publication of notice to creditors, the judgment was barred. This appeal is from that order.

We are of the opinion that it follows as a matter of course, when Mrs. Harvey was substituted in this court as a party appellant instead of her deceased husband, that the judgment as affirmed by this court became a judgment against her in her representative capacity. Otherwise there was no necessity for substitution. This precise question is a new one in this court and no authorities directly in point have been cited to us, except the case of *Brennan v. Brennan,* 65 Cal. 517, 4 Pac. 561. That was a case where Thomas Brennan obtained a judgment against Daniel Brennan for $1,538. Daniel moved for a new trial, but died before the decision of the motion. Hannah Brennan was appointed executrix of his estate and substituted as defendant. At the hearing of the motion, an order was made modifying the judgment so as to make the amount $990 instead of $1,538. An entry was made of the order, and the figures were changed on the judgment roll, but no new judgment was entered. Bridget Brennan, as executrix of the estate of Thomas Brennan, deceased, filed a petition asking that Hannah Brennan, as executrix of the estate of Daniel, be directed to pay the amount of the judgment. In that case the court said:

"The judgment rendered at the instance of the moving party, the executrix of D. Brennan, deceased, was, in legal effect, a judgment against her. She had then been made a party. Her testator had then died. No valid judgment could have been entered against the testator after his death. The new judgment was one against the executrix, to be paid in due course of administration."

The court then, after discussing some of the facts, said:

"She was a party to the action and took part in the litigation. The testator had fully defended the action; judgment had passed against him, he served notice of intention to move for a new trial, and then died. Before the hearing of this motion his executrix had been made a party to the action, and she prosecuted the motion with the result above stated. The judgment was one which could only have been paid in due course of administration. No execution could have issued on it. No payment of it is pretended. We do not see, under these circumstances, that any presentation of the judgment was required under section 1505 of the Code of Civil Procedure."

The facts in that case are substantially the facts in this case. The section 1505 referred to of the Civil Code of Procedure of California is in substance the same as our § 1483, Rem. Code. We think there can be no doubt that the judgment as affirmed by this court against the substituted appellant, Mrs. Harvey, as administratrix of the estate of Lee B. Harvey, deceased, was a judgment against her in her representative capacity. Section 1483, Rem. Code, provides:

"The effect of any judgment rendered against any executor or administrator shall be only to establish the claim in the same manner as if it had been allowed by the executor or administrator and the court; and the judgment shall be, that the executor or administrator pay, in due course of administration, the amount ascertained to be due, but no execution shall issue upon such judgment, nor shall it create a lien upon the property of the estate, or give the judgment creditor any priority of payment."

It seems clear from this statute that this judgment became a judgment against the administratrix of the estate of Lee B. Harvey, and that it was not necessary thereafter to present a claim against the administra-

trix for the amount of this judgment. It was required to be paid, by the terms of the statute, in due course of administration. Respondent relies upon the next section, § 1484, Rem. Code, which provides as follows:

"When any judgment has been rendered against the testator or intestate in his lifetime, no execution shall issue thereon after his death, but it shall be presented to the executor or administrator as any other claim, but need not be supported by the affidavit of the claimant, and if justly due and unsatisfied, shall be paid in due course of administration: Provided, however, that if it be a lien upon any property of the deceased the same may be sold for the satisfaction thereof, and the officer making the sale shall account to the executor or administrator for any surplus in his hands."

That section refers only to judgments rendered against the testator or intestate in his lifetime, where a judgment has become final and no appeal has been prosecuted therefrom, and no substitution of the executor or administrator has been made as a party to the judgment. In such case, it is necessary that a claim shall be presented to the executor or administrator, as any other claim. But that section cannot be construed to apply to a case where the executor or administrator has been made a party to the litigation. The trial court probably misconstrued the effect of the decision in *In re Richardson's Estate,* 97 Wash. 488, 166 Pac. 776. That was a case where the Anderson Steamboat Company was dismissed from an action and costs in the sum of $38.60 were taxed against the plaintiff. Thereupon the judgment creditor sought to collect the costs from the administratrix of the estate of B. F. Richardson, deceased. The court made an order directing the administratrix to pay to the Anderson Steamboat Company its costs as taxed,

" 'and in the event that the said administratrix fails and neglects or refuses to pay said sum on or before 5 o'clock p. m. of October 17, 1916, that her letters of administration be and the same hereby are revoked, cancelled and set aside.' "

From that order, an appeal was taken, and this court reversed the order, saying:

"Our probate practice affords an orderly method for the presentation and payment of claims against estates, even though, as here contended, the claim presented is in the form of a judgment against the administratrix. Rem. Code, § 1483. Respondent argues that a different rule should apply where the court has taxed costs against the administratrix and thus in effect judicially determined the status of the matter. The answer is that the statute affords but one method and that method must be followed."

In that case this court was considering the method of payment of the judgment, and nothing else. The question of the filing of the claim with the administratrix was not considered there. The only question made was as to the method of payment. The lower court made an order requiring the administratrix to pay, and in default, that her letters be revoked and cancelled. There was no warrant in the statute for such an order. The statute, which we have above quoted, says that the judgment shall be paid in due course of administration, and the court was therefore not justified in ordering payment in any other way. That case has no application to the question under discussion upon this appeal; for here the only question is, whether it was necessary to file the claim upon a judgment which had been rendered against the administratrix in her representative capacity. We are satisfied that it was not necessary, under the direct terms of the statute, and that the judgment should be paid in due course of administration.

The order appealed from is therefore reversed, and the cause remanded to the lower court for further proceedings not inconsistent with this opinion.

HOLCOMB, C. J., MITCHELL, TOLMAN, PARKER, and MAIN, JJ., concur.

MACKINTOSH, BRIDGES, and FULLERTON, JJ. (dissenting)—We cannot agree with the result announced by the majority of the court, for this reason: Section 1484, Rem. Code, reads as follows:

"When any judgment has been rendered against the testator or intestate in his lifetime, no execution shall issue thereon after his death, but it shall be presented to the executor or administrator as any other claim, but need not be supported by the affidavit of the claimant, and if justly due and unsatisfied, shall be paid in due course of administration: Provided, however, that if it be a lien upon any property of the deceased, the same may be sold for the satisfaction thereof, and the officer making the sale shall account to the executor or administrator for any surplus in his hands."

This section is identical with § 119 of the 1917 probate code, Laws of 1917, ch. 156, p. 675. The judgment in this case was recovered during the lifetime of Harvey and became a lien upon such real estate as he owned, which could have been sold at any time after the rendition of the judgment, either before or after Harvey's death, had the appellant so desired, for it must be remembered that, although an appeal was taken from the judgment, the judgment was not superseded, and, therefore, the appeal did not suspend or destroy the full force and validity of the judgment pending its final determination in this court. The judgment not having been superseded, the appellants were possessed of a valid judgment which, by the terms of the section quoted, they had the right to present to

the administratrix for payment in the same manner as any other claim, or to collect from such real estate as was covered by the lien of the judgment. Not only did they have this right, but, as we read the section, it was their duty so to do, and having failed therein, the claim is barred, as any other claim must be which is not presented within one year. The case of *In re Richardson's Estate,* 97 Wash. 488, 166 Pac. 776, was a case where a judgment for costs had been taken against the administratrix in an action which she had instituted in her representative capacity, and upon her refusal to pay the judgment, an order was made that her letters of administration be revoked, unless she paid the judgment by a certain time fixed in the order. From this order she appealed, and we there held, as quoted in the majority opinion, that the probate law provides an orderly method for the payment of claims, including judgment against the administratrix.

In the case of *Barto v. Stewart,* 21 Wash. 605, 59 Pac. 480, we said:

"If we are to give effect to all these provisions of the statute, and the general rules of statutory construction applicable thereto, it is obvious that the word 'claim' must have a uniform sense throughout the statute and be held to include every species of liability which the executor or administrator can be called on to pay, or to provide for the payment of, out of the general fund belonging to the estate."

In *Crowe & Co. v. Adkinson Const. Co.,* 67 Wash. 420, 121 Pac. 841, Ann. Cas. 1913D 273, we held that it was necessary to present a mechanics' lien to the administrator for allowance or rejection, in the course of which opinion this appears:

"We have further held that the claim of a judgment creditor must be presented to the personal representative of a deceased person. *Meikle v. Cloquet,* 44 Wash. 513, 87 Pac. 841; *Doyle v. McLeod,* 4 Wash. 732,

31 Pac. 96. Such, we think, is the plain meaning of the statute."

It would appear from these cases that the court had adopted the view that a judgment must be presented to the administrator, and unless such is the law, the section which we have quoted is read out of the probate code whenever an appeal is subsequently taken from the judgment, even though the effect of the judgment has not been superseded by a bond, for it is elementary law that an appeal without supersedeas does not annul or set aside the judgment appealed from. 3 C. J. 1261; 2 R. C. L. 117.

While, as we have said, in our opinion, the effect of the majority opinion is to read out of the probate code § 1484, Rem. Code (now § 119 of the 1917 probate code, Laws 1917, p. 675), the interpretation that we give this section maintains that section in effect and is perfectly reconcilable with § 1483, relied on by the majority of the court. In our opinion, these two sections are harmonious and, if properly interpreted, are both operative. Our interpretation would be that, in actions brought against an executor or administrator, the judgment rendered need not be presented as a claim, but that, in actions brought against the testator or intestate, upon which judgment is rendered against him, such judgments must be presented to the administrator or executor as claims. This harmonizes both sections and, in our view, fulfills the express intention of the statute.

The argument that the presentation of the judgment is a useless act is answered by our opinion in *First Security & Loan Co. v. Englehart,* 107 Wash. 86, 181 Pac. 13.

We therefore dissent.

[No. 15451. Department One. December 15, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK SOWDERS, *Appellant*.[1]

HOMICIDE (131)—APPEAL—HARMLESS ERROR—INSTRUCTIONS. Upon a conviction of manslaughter, a misdirection in defining murder in the first degree is harmless error.

CRIMINAL LAW (302, 311)—TRIAL—INSTRUCTIONS—REPETITION. It is not error to fail to repeat instructions as to the justification for manslaughter where, in view of the instructions as a whole, the jury could not have been misled.

HOMICIDE (131)—APPEAL—HARMLESS ERROR—INSTRUCTIONS. Failure to mention accident or misfortune in instructions as to justification for murder in the second degree is not fatal to a conviction of manslaughter.

CRIMINAL LAW (311)—TRIAL—INSTRUCTIONS AS A WHOLE. An instruction on the subject of manslaughter using the words "not being excusable or justifiable," held not to mean to the jury that accused acted without justification, in view of all the instructions given.

HOMICIDE (33)—INDICTMENT AND INFORMATION (103)—DEGREES OF HOMICIDE. An information charging murder in the first degree includes and warrants conviction of the lesser degree of manslaughter.

HOMICIDE (114)—INSTRUCTIONS—ACCIDENT OR MISFORTUNE. An instruction that a homicide is excusable when committed by accident or misfortune in doing a lawful act without unlawful intent and that an accident is an event without occurrence of the will or expectation, is clear and sufficient on the subject.

CRIMINAL LAW (451)—APPEAL—HARMLESS ERROR—ARGUMENTS OF COUNSEL. Error cannot be predicated on unduly restricting argument of counsel to which assent was given.

SAME (451). Error cannot be predicated on argument of counsel for the prosecution which was fair and in answer to defendant's counsel.

INFANTS (16)—JUVENILE OFFENDERS—PUNISHMENT—STATUTES. A boy under sixteen years of age may be committed to the state penitentiary, notwithstanding Rem. Code, § 1982-12, providing that such a child shall not be confined in any building with adult convicts.

[1]Reported in 186 Pac. 260.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered March 10, 1919, upon trial and conviction of manslaughter. Affirmed.

A. O. Burmeister and *M. J. Gordon,* for appellant.

Wm. D. Askren and *J. W. Selden,* for respondent.

MITCHELL, J.—By an information, Frank Sowders was charged with the crime of murder in the first degree, in that he unlawfully and feloniously, purposely, and of his deliberate and premeditated design to effect the death of one Walter Hopkins, killed and murdered said Walter Hopkins by shooting him with a revolver, said killing not being excusable or justifiable. To the information, he entered a plea of not guilty, and upon trial the jury returned a verdict of guilty of manslaughter. Motions in arrest of judgment and for a new trial having been denied, judgment and sentence upon the verdict were entered.

The case is presented here under fifteen assignments of error.

I. It is contended that, in instructing the jury, the court, in defining the crime of murder in the first degree, went beyond the terms of the information. The statute defining the manner in which murder in the first degree is committed has four subdivisions. In this instruction two of those subdivisions were quoted, one of which, it is claimed, goes beyond the charge contained in the information, as to the manner in which it is alleged the crime was committed, and therefore constitutes reversible error. We are satisfied that the controversy is not now properly in the case. The verdict of manslaughter shows that the jury had not been convinced the appellant was guilty of either kind of conduct mentioned by the court in defining the crime of murder in the first degree, so that, even if,

for the sake of argument, it be admitted there was misdirection in the instruction complained of, it must be considered harmless and of no avail to appellant. *State v. Blaine,* 64 Wash. 122, 116 Pac. 660.

II. Fault is found with a part of the instructions relating to manslaughter. Its vice is said to consist in not advising the jury that manslaughter is excusable and justifiable under certain circumstances. The whole charge to the jury was almost necessarily elaborate, since it referred to the crime primarily charged and the lesser crimes of murder in the second degree and of manslaughter included therein. The court had already clearly and correctly defined manslaughter in the statutory language and declared it to be inconsistent with excusable or justifiable killing; and also instructed as to what constitutes excusable and justifiable homicide, in the language of the statute. Afterwards, the court, somewhat by way of repetition, spoke, among other things, of the elements of premeditation and deliberation as necessary in the crime of murder in the first degree, but not in the crime of murder in the second degree, and then immediately used the language objected to concerning manslaughter, which omits any reference to premeditation and deliberation. As already stated, the criticism of the language is that it is deficient for failure to repeat in this connection the rule with reference to excusable and justifiable homicide. Still later, however, in the instructions, the court again specifically told the jury:

"If you find from the evidence in this case, beyond a reasonable doubt, that the defendant killed the deceased, Walter Hopkins, but that it was without any design to effect the death of the said Walter Hopkins, and not being excusable or justifiable, then the defendant would be guilty of manslaughter, only."

We are satisfied the words complained of, especially considering their setting, did not mislead the jury from the main central idea repeatedly impressed upon them on this subject in the charge as a whole. *State v. Regan,* 8 Wash. 506, 36 Pac. 472; *State v. Cushing,* 17 Wash. 544, 50 Pac. 512; *State v. Riddell,* 33 Wash. 324, 74 Pac. 477; *State v. Clark,* 34 Wash. 485, 76 Pac. 98, 101 Am. St. 1006.

III. Appellant claims error because of the following instruction:

"In the case on trial, if you are satisfied beyond a reasonable doubt that the defendant shot and killed Walter Hopkins, at the time and place alleged in the information, and is guilty; but you have a reasonable doubt whether the crime is murder in the first degree, but have no reasonable doubt that the defendant is guilty of murder in the second degree, then your verdict should be, guilty of murder in the second degree."

In this respect counsel but refer to their argument in support of assignment number II, and claim that the omission of the court in this particular instruction to mention the subject of accident or misfortune is fatal to the verdict of manslaughter. We need not repeat our reasons for the opinion to the contrary, and, in addition, the appellant was not found guilty of murder in the second degree, but of manslaughter.

IV. It is contended the words, "and not being excusable and justifiable," contained in that portion of the instruction quoted in the latter portion of subdivision II of this opinion, were unwarranted and that, taken in connection with that part of the instruction which precedes them, might be taken by the jury to mean that, under the evidence in the case, the appellant acted without justification and excuse. On the contrary, if we take only that which precedes—much less the whole of the charge, as the rule requires—we

find nothing in the words complained of to reasonably tempt the jury in the direction suggested by the appellant.

V. Assignments numbered V, VI and XIII, by the appellant's consent, present the same legal proposition, to the effect that manslaughter is not included in a charge of killing purposely and with design, consequently is not within the information, and hence it was error to permit the jury to consider it; and likewise error to enter judgment and sentence upon such a verdict. In considering the proposition it will be kept in mind that the statute law of this state defines the crime of manslaughter and provides for its punishment. There is ample evidence in this case to establish appellant's guilt of that crime. It is argued, however, that the information upon its face states facts which preclude any theory of manslaughter—states facts which affirmatively show the killing not to have been manslaughter—hence there could legally be no conviction under the information of other than murder in the first or second degree. For support of this proposition reliance is had by appellant upon *State v. Palmer,* 104 Wash. 396, 176 Pac. 547; and *State v. Hoyer,* 105 Wash. 160, 177 Pac. 683. In this state, prior to 1909, an indictment or information charging murder in the first degree was uniformly held to include the accusations of the lesser crimes of murder in the second degree and of manslaughter, under which, evidence was admissible of either of the three crimes, entitling the state to a verdict of either as the jury might determine, if supported by satisfactory evidence. The cases relied on by appellant in no way change the rule, although they declare that the crime of manslaughter as it was known at common law and by our statute was changed by the criminal code of 1909. The *Palmer* case further holds that an

instruction upon the subject of manslaughter was properly refused in that case, for two reasons: First, because the defendant admitted his purpose and design to kill, but sought to justify under the plea of self-defense; and second, because there was no evidence in the case tending to show manslaughter as defined in the present statute.

VII. The court refused to give an instruction as prepared and requested by appellant on his theory that the shooting was accidental. The record shows, however, that the court, in language of its own choosing, said to the jury:

"I instruct you that homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means with ordinary caution and without any unlawful intent. An accident is an event happening without the occurrence of the will of the person by whose agency it was caused. It is an event that takes place without one's foresight or expectation."

The instruction given was clear and sufficient on the subject.

VIII. It is claimed appellant's counsel was unduly restricted in argument to the jury with regard to an instruction requested by appellant and given by the court concerning appellant's character. In the course of the argument to the jury, his attorney, referring to the matter, said:

"The instruction which the court gave you stands as evidence in defendant's favor. No man has come forward to assail his character."

At this juncture, the prosecuting attorney, addressing the court, objected with the statement:

"There is no evidence in this case with reference to character one way or the other and I think he has no right to discuss it."

Thereupon, appellant's attorney said:

"That satisfies me; that sends me to the instruction. There is no evidence on the question of character."

Just then the jury was ordered withdrawn and there was some discussion between the court and the attorneys as to the wording of the particular instruction in question. The court announced it would not be changed, and appellant's counsel then stated: "Then I wish to read the instruction and not comment on it." The court assented, ordered the jury in, and counsel read the instruction to the jury.

IX. Assignments numbered IX, X, XI and XII are grouped by appellant as of the same sort. They refer to arguments by the prosecuting attorney to the jury and are characterized as indicative of mistaken zeal on the part of the speaker. Without giving the details, we are satisfied there is no just complaint. The statements complained of were fair and in answer to arguments made by appellant's counsel and rested in part upon appellant's testimony.

XIV. This assignment calls attention to the denial of the motion for a new trial and raises no distinctive question.

XV. Lastly, it is insisted the judgment and its form are erroneous because appellant, a boy of sixteen years of age, has been sentenced to the penitentiary. This assignment is answered in the negative by the case of *State ex rel. Sowders v. Superior Court,* 105 Wash. 684, 179 Pac. 79.

Judgment affirmed.

HOLCOMB, C. J., MACKINTOSH, MAIN, and PARKER, JJ., concur.

[No. 15475. Department Two. December 15, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v. MIKE FRANICH, *Appellant*.[1]

INTOXICATING LIQUORS (48) — ILLEGAL POSSESSION — BURDEN OF PROOF. In a prosecution for illegal possession of intoxicating liquors, the burden is upon the defendant to show that he was not a clergyman, priest or rabbi, excepted by Laws 1917, p. 61, § 12.

SAME (50)—EVIDENCE—SUFFICIENCY. A conviction of the illegal possession of intoxicating liquor is sustained by proof that, during a search of the premises, accused threw a broken demijohn from the window, and intoxicating liquor was found dripping from it and on the floor and wall of the room.

Appeal from a judgment of the superior court for Pierce county, Fletcher, J., entered May 6, 1919, upon a trial and conviction of violating the prohibition law. Affirmed.

P. L. Pendleton, for appellant.

W. D. Askren, for respondent.

HOLCOMB, C. J.—On April 5, 1919, the appellant was charged, by information in the superior court for Pierce county, as follows:

"That the said Mike Franich, in the county of Pierce, in the state of Washington, on or about the 4th day of April, nineteen hundred and nineteen, then and there being, unlawfully did have in his possession intoxicating liquor other than alcohol, to wit: moonshine whiskey, he, the said Mike Franich, not then and there being a regularly ordained clergyman, priest or rabbi actually engaged in ministering to a religious congregation."

On the day named in the information, two deputy sheriffs of Pierce county went to the home of appellant and proceeded to make a search therein for an

[1]Reported in 186 Pac. 259.

illicit whiskey still supposed to be operating in that locality. While the sheriffs were engaged in the search of the premises, one of them had his attention attracted to a crash as of the breaking of a jug against the wall of the cabin where appellant roomed, and immediately afterwards he saw appellant throw a broken demijohn from the window of the cabin. The sheriff went to the spot and picked up the broken demijohn. From it was dripping some liquid. He went up to appellant's room and discovered where some of the fluid had dripped on the floor and wall. Appellant was in the room, with his right hand cut and bleeding. The sheriff immediately tested the liquor in the broken demijohn and on the floor and found it would burn. He also smelled of it and recognized it as what is known as "grappo," a brandy distilled from grapes. The sheriff found other bottles in appellant's room, each of which had a few drops of liquor, which were recognized by witness as "grappo." The broken demijohn and the empty bottles were before the jury during the trial as exhibits. None of the liquor itself was before the jury. No evidence was offered by the appellant at the trial.

Appellant first contends, "The evidence is not only insufficient, but it is wholly lacking. The evidence utterly fails to establish moonshine whiskey."

Appellant's second contention is that the state failed to prove that appellant was not a clergyman, priest or rabbi, actually engaged in ministering to a religious congregation, and that, without such proof, the appellant is within the justification for possession of the liquor found in § 12, ch. 19, Laws of 1917, p. 61. There is authority for the contention that the exception contained in the statute must be negatived by the prosecution, because the exception is contained in and is such an inherent part of the definition of the offense

that failure to prove the negative amounts to the failure of proof of a material allegation of the information. There is a well settled rule of law, however, which is clearly stated in 5 Am. & Eng. Ency. Law (2d ed.), p. 41, as follows:

"Similar in result to the effect of presumptions is the effect of peculiar knowledge possessed by one party of the evidentiary facts which the other party claims would, if brought forward, tend to sustain the claim of the latter. In such case, if the party possessed of such knowledge fails to bring forward the facts which it is shown can be produced by him alone, a presumption arises in favor of his adversary's claim."

We have just decided the same question contrary to appellant's contention in *State v. Harding,* 108 Wash. 606, 185 Pac. 579, and that case is controlling.

The evidence introduced by the state, as recited herein, to prove the charge was competent to make a *prima facie* case, and not being in any respect met or controverted by the appellant, was sufficient basis for the verdict.

There is therefore no merit in the claim of appellant that there was no evidence sufficient to justify the conviction.

Judgment affirmed.

MOUNT, TOLMAN, BRIDGES, and FULLERTON, JJ., concur.

[No. 15480. Department Two. December 15, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v. SAM KAUKOS *et al.*, *Appellants*.[1]

CRIMINAL LAW (107)—EVIDENCE OF OTHER OFFENSES. In a prosecution of two persons for opening and carrying on a gambling game as owners or managers, on a certain date, evidence of like offenses in the same place on other days in which both participated is admissible not only for the purpose of showing that defendants were operating the game in question, but to show their interest as owners or managers; as the offense may be committed by a series of acts.

GAMING (17)—EVIDENCE—SUFFICIENCY. A conviction of conducting a gambling game as owner or manager is sustained by evidence that accused was one of the owners of the premises and furniture, and was present and participated in the game.

Appeal from a judgment of the superior court for Grays Harbor county, Abel, J., entered May 19, 1919, upon a trial and conviction of conducting a gambling game. Affirmed.

W. H. Abel, for appellants.

J. E. Stewart and *J. A. Hutcheson*, for respondent.

BRIDGES, J.—The information in this case charged the defendants jointly with the crime of opening, conducting, carrying on and operating, as managers, owners or dealers, a gambling game known as stud-poker, on or about the 23d day of March, 1919, in the county of Grays Harbor, state of Washington. The information is substantially in the words of the statute. The defendants were tried jointly, found guilty and sentenced. From that judgment, they appeal.

The testimony tended to show that, some time prior to the date alleged in the information, the two defendants leased the premises in which it is charged the crime was committed, and that, at about the same

[1]Reported in 186 Pac. 269.

time, they purchased, or otherwise acquired, furniture for the leased premises; that, on the 19th day of March, 1919, the defendant George Karaiskos was running the game and dealing, and the defendant Sam Kaukos was present and, at least a part of the time, playing in the game as any one else; that, on March 20, 1919, the defendant Sam Kaukos was running the game and dealing; and that, on March 22, 1919, the defendant George Karaiskos was operating the game and dealing, and the defendant Sam Kaukos was present and participating in the same, as did others present; and that, on the 23d of March, the defendant Sam Kaukos was operating the game and dealing, and the defendant George Karaiskos was present and playing in the game, as others were playing. When the evidence was all in, the court required the prosecuting attorney to elect as to which date he would select, and the date mentioned in the information, to wit, March 23d, was selected.

The statute under which the defendants were charged reads as follows:

"Every person who shall open, conduct, carry on or operate, whether as owner, manager, agent, dealer, clerk, or employee, and whether for hire or not, any gambling game or game of chance, played with cards, dice, or any other device, or any scheme or device, whereby any money or property or any representative of either, may be bet, wagered or hazarded upon any chance, or any uncertain or contingent event, shall be a common gambler, and shall be punished by imprisonment in the state penitentiary for not more than five years." Rem. Code, § 2469.

The chief point raised by the appellants is that the court committed prejudicial error in receiving testimony concerning the operation of the game on days other than on the day named in the information. The courts have found it very difficult to lay down any very

precise rules concerning the admission of testimony tending to prove other and distinct offenses. We have not seen any better or clearer discussion of the matter than is contained in *State v. Gottfreedson,* 24 Wash. 398, 64 Pac. 523, wherein Judge Dunbar used the following language:

"The general rule is well established that proof of the commission of a separate and distinct crime will not be admitted for the purpose of aiding the conviction of the defendant for the crime charged. There are exceptions, however, to this general rule, as where the testimony shows a connection between the transaction under investigation and some other transaction, and where they are so interwoven that the omission of the testimony in relation to the other crime would detract something from the testimony which the state would have the right to introduce as tending to show the commission of the crime charged by the defendant, or where it is apparent that the parties had a common purpose in the transaction of both crimes, or where the testimony tending to show the commission of one crime tends to prove a condition of mind which must necessarily be entertained by the defendant in the commission of the crime charged. . . ."

There are, at least, two essential elements which must be proven in order to justify conviction in this case; one is, that the defendants opened, conducted, carried on or operated the game at the time charged in the information, and the other is that they did so either as owners, managers, agents, dealers, clerks or employees. We think the testimony to which objection is made was clearly admissible, not only for the purpose of showing that the defendants were operating the game on the date mentioned in the information, but also for the purpose of showing their interest in the same as owners or managers. The testimony shows that, on the day fixed in the information, Sam Kaukos was actively engaged in operating the game and that,

at that particular time, the other defendant, George Karaiskos, was present and playing. Testimony to the effect that George Karaiskos had operated the game on the previous night and that Sam Kaukos was present and playing, and that the game was operated in like manner on several previous nights, had a strong tendency, along with the other testimony to the effect that both defendants rented the premises and owned the furniture, to show that, on the night named in the information, each defendant was interested in and operating the game. There was a direct connection between the crime charged and those committed on the previous nights. Defendants' connection with the previous games tended to show their connection with the game with which they were charged. In the case of *Bibb v. State,* 83 Ala. 84, 3 South. 711, the court said:

"The offense of keeping a gaming-table may be committed by a single act, or it may be one continuous in its nature, and may therefore be proved by one act, or a series of acts, showing the requisite criminal intention, by the proper measure of proof."

In the case of *Rasor v. State,* 57 Tex. Cr. 10, 121 S. W. 512, the court said:

"Appellant was charged with keeping and being concerned in keeping a place where the people resorted for the purpose of gambling, and did gamble. Evidence going to show acts, control, ownership and direction on the part of appellant of the place where the gambling was done both before and immediately after the day alleged in the indictment is admissible testimony to prove the facts in the case."

In the case of *People v. Schwartz,* 14 Cal. App. 9, the defendant was charged with carrying on the business of bookmaking in violation of the statute. There was testimony tending to prove the carrying on of this business by the defendant at a time other than

that set out in the information. With reference to this testimony, the court said:

"But this evidence tended to show that the defendant was actually engaged in the business of bookmaking and the acts referred to being similar to the one averred in the information, and having been committed at about the same time, illuminated the act charged, and were admissible to show the true character of the act charged."

In the case of *Chase v. People,* 2 Colo. 509, it was held that, upon an information for keeping a room to be used and occupied for gambling, evidence may be received to show that gambling was carried on in the room prior to the time alleged in the information, for the purpose of explaining the character of the use and the purpose for which it was used. See, also, *Toll v. State,* 40 Fla. 169, 23 South. 942; *Parshall v. State,* 62 Tex. Cr. 177, 138 S. W. 759; *People v. O'Malley,* 52 App. Div. 46, 64 N. Y. Supp. 843. The conclusion to which we have come is in harmony with the decisions of this state: *State v. Pittam,* 32 Wash. 137, 72 Pac. 1042; *State v. Craddick,* 61 Wash. 425, 112 Pac. 491; *State v. Hazzard,* 75 Wash. 5, 134 Pac. 514; *State v. Schuman,* 89 Wash. 9, 153 Pac. 1084, Ann. Cas. 1918A 633. Nor is our holding here out of harmony with the case of *State v. Smith,* 103 Wash. 267, 174 Pac. 9, which is strongly relied on by the appellants. In that case, it was held that testimony of other similar but distinct offenses committed by the defendant was inadmissible. But there the defendant was charged with selling morphine without a physician's prescription. Manifestly, the fact that defendant sold morphine without a physician's prescription, at times other than on the date mentioned in the information, had no tendency whatsoever to prove that he com-

mitted the crime referred to on the date charged in the information.

At the close of the case, defendant George Karaiskos moved for a directed verdict of acquittal on the ground that there was no proof tending to show that he was present on the date mentioned in the information, or had any knowledge that a game of poker was being played on that date. The testimony clearly shows, however, that that defendant was present on the date mentioned in the information, and not only had information that the game was in progress, but actually played in the game for a part of the evening. We think this, with the other testimony tending to show his connection with the operation and ownership of the game, was amply sufficient to take the case to the jury. Finding no error, the judgment is affirmed.

HOLCOMB, C. J., MOUNT, FULLERTON, and TOLMAN, JJ., concur.

[No. 15489. Department Two. December 15, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v. INEZ PETERSON, *Appellant*.[1]

FALSE PRETENSES (16)—EVIDENCE—SUFFICIENCY. In a prosecution for attempted larceny by false pretenses in a telephone order for goods, accused's connection with the person telephoning is sufficiently shown by her attempt to receive the goods at the appointed place, together with her subsequent explanations and behavior.

SAME (4) — DEFENSES — ATTEMPT UNSUCCESSFUL. A prosecution for attempted larceny by false pretenses in a telephone order for goods does not fail because the attempt was unsuccessful.

SAME (13)—EVIDENCE—ADMISSIBILITY. In a prosecution for attempted larceny by false pretenses in a telephone order for goods, evidence of the telephone conversation is admissible as part of the transaction, regardless of the fact that its probative effect depended upon the evidence to connect the accused therewith.

[1]Reported in 186 Pac. 264.

INDICTMENT AND INFORMATION (104) — CONVICTION OF ATTEMPT. Under Rem. Code, § 2263, one informed against for larceny by false pretenses may be convicted of an attempt to commit the offense.

Appeal from a judgment of the superior court for King county, Smith, J., entered May 3, 1919, upon a trial and conviction of larceny. Affirmed.

Howard O. Durk, for appellant.

Fred C. Brown and *John A. Frater,* for respondent.

FULLERTON, J.—The appellant was accused, by information, of the crime of larceny, and upon a trial before a jury, was convicted of an attempt to commit the crime of larceny. From the judgment and sentence pronounced upon the verdict, she appeals.

The evidence tended to show the following facts: On December 24, 1918, some woman called by telephone the merchandise store of McDougall & Southwick, in the city of Seattle, and, representing herself to be Mrs. Edgar Ames, a person whom the employees of the store knew to be the wife of a member of a shipbuilding company of the city named and a credit customer of the store, stated that she desired to purchase and have sent to the wife of a sick employee of the shipbuilding company certain merchandise as a Christmas present. She further stated that the person for whom the goods were intended lived out of the city of Seattle near the town of Kent, and inquired whether delivery could be made to her there. She was informed that the delivery wagons of the store did not go to Kent, but as a special favor to her, if she desired it, a wagon would be sent out to make the delivery on Christmas morning. The woman speaking then said that there was a Miss Ellenberger employed in the office of the shipbuilding company who lived at Kent, and that she thought possibly she might induce her to take the

package out to Kent, and would call the store up later and let them know. She then inquired the name of the person speaking, and being given the name, closed the telephone. Later on, she again called the store and inquired for the person with whom she had previously talked. On being put in communication with him, she informed him that Miss Ellenberger had consented to take the package and would receive it at the interurban depot at four o'clock. The person answering for the store was the superintendent, and he desired her to give the place and number of the telephone at which she then was, also her home address, saying he would later put her in communication with the mail order department of the store, from which her order could be more conveniently given attention. She gave her then location as the Y. M. C. A. building, the telephone number of the place from which she was speaking, and the telephone number of her home, but stated that she objected to waiting, as she was very busy and desired to give the order immediately. The superintendent at once recognized that the numbers given were not the numbers of the telephones at the places indicated, but nevertheless put her in communication with another employee of the store, where an order was given for merchandise appropriate for women's wear, amounting to $26.10. Both the superintendent and the employee taking the order reached the conclusion that it was not Mrs. Ames who had given the order, and later on Mrs. Ames was called, when the fact was positively ascertained. The goods ordered were packed and, at the appropriate time, sent to the depot named by a young man connected with the delivery department of the store. In the meantime the police department of the city was communicated with and detectives were sent to the depot to arrest the person who should receive the package. When the messenger reached the

depot, he sought to deliver the package to the station agent. The agent declined to receive it, when the appellant approached the counter and, to paraphrase the language of the messenger, snatched the package out of his hand. Just then the appellant discovered the presence of the city detectives, when she dropped the package and walked back to a seat in the depot. She was then arrested and taken to the police station. The evidence also goes somewhat minutely into the conduct of the appellant after her arrest, both at the depot and at the police station. This we shall not detail. Its tendency was to connect the appellant with knowledge of the telephone messages given the employees in the store earlier in the day.

It is the appellant's first contention that the evidence fails to connect the appellant with the person who ordered the merchandise over the telephone. There was no direct evidence of the fact, it is true, but the indirect evidence, to our minds, hardly leaves the matter in doubt. Her conduct at the time of the attempted delivery to the station agent, her subsequent explanations, and her behavior generally, all tended to show that she was either the person who telephoned, or that she had intimate knowledge of the act and the purpose sought to be accomplished thereby. Either conclusion would justify the verdict of the jury.

A further contention is that the facts shown do not constitute an attempt to commit a crime. The argument is that, since the employees of the store were not deceived by the false pretense, and since they did not part with the goods because thereof, there would have been no crime of larceny had the appellant procured the goods from the messenger and carried them away, since the rule is there can be no attempted crime in cases where there could be no crime if the attempt had been successful. But this argument overlooks the fact

that the attempt to deceive by the telephone order is as much a part of the offense as was the attempted taking and asportation of the goods at the depot. Had the ruse succeeded in its entirety, there would have been a consummated offense, and it does not follow from the fact that the employees of the merchandise house were not deceived there is taken away from the transaction the element of attempt to deceive.

A further contention is that the court erred in admitting evidence of the telephone conversation, and erred in refusing to strike the evidence on a subsequent motion made to that effect. The objection is that the appellant was in no way connected with the conversations. Our conclusion to the effect that the evidence does sufficiently connect the appellant with the conversations is probably a sufficient answer to the objection, but the evidence was properly admitted in any event. It was a part of the circumstances of the transaction, necessary to an understanding thereof, and as much entitled to be shown as any other circumstance connected therewith. Its probative effect to establish the appellant's guilt depended upon the evidence connecting her therewith, but it was admissible regardless of this question.

As explanatory of the case as a whole, it may be proper to add that the offense of obtaining money or property by false pretenses is now denominated larceny by the criminal code (Rem. Code, § 2601), and that, under the express provisions of the same code, a person informed against for a consummated offense may be convicted of an attempt to commit the offense (Id., § 2263).

The judgment is affirmed.

HOLCOMB, C. J., MOUNT, TOLMAN, and BRIDGES, JJ., concur.

[No. 15497. Department One. December 15, 1919.]

JOHN G. MALM, *Respondent*, v. ELIZABETH GRIFFITH, *Appellant*.[1]

MORTGAGES (107, 113)—SALE BY MORTGAGOR TO MORTGAGEE—JUNIOR LIENS—RIGHT OF REDEMPTION. In view of Rem. Code, §§ 594, 595, entitling a junior mortgagee to redeem within one year after foreclosure of a senior mortgage, a senior mortgagee who took a quitclaim deed under an agreement for redemption within one year, without notice of a prior unrecorded mortgage, is not a *bona fide* purchaser for value, but takes subject to the junior mortgagee's right to redeem.

SAME (57)—PRIORITIES BETWEEN MORTGAGES. A conveyance to secure a pre-existing debt does not confer upon the grantee the right of a *bona fide* purchaser as against a prior unrecorded mortgage unknown to the grantee.

SAME (256, 257)—REDEMPTION—LACHES. Delay for eight years in recording a mortgage does not affect the mortgagee's right to redeem from a subsequent mortgage, where the only effect of the delay was to render it a second or junior mortgage.

Appeal from a judgment of the superior court for King county, Smith, J., entered February 3, 1919, upon sustaining a demurrer to the answer and cross-complaint, in an action to quiet title. Reversed.

Tom Alderson, for appellant.

Dan Earle, for respondent.

PARKER, J.—The plaintiff, John G. Malm, commenced this action in the superior court for King county, seeking the quieting of his title to a lot in the city of Seattle, as against the claim of the defendant, Elizabeth Griffith, made under a mortgage thereon given to her by Edward C. Haydon and wife while the owners of the lot, who thereafter conveyed it to Malm at a time when he had no notice, either actual or constructive, of the existence of the mortgage, it not being recorded

[1]Reported in 186 Pac. 647.

until after the execution of the deed given to him. The cause was disposed of in the superior court upon Malm's demurrer to Mrs. Griffith's amended affirmative answer and cross-complaint. The court having sustained the demurrer, and Mrs. Griffith electing to stand upon her amended affirmative answer and cross-complaint, judgment was rendered against her quieting title in Malm as prayed for. From this disposition of the cause, Mrs. Griffith has appealed to this court.

The facts, as alleged in Mrs. Griffith's affirmative answer and cross-complaint, may be summarized as follows: On December 1, 1909, the Haydons executed and delivered to Mrs. Griffith their promissory note evidencing an indebtedness due from them to her of $3,000. To secure this indebtedness, they, at the same time, executed and delivered to Mrs. Griffith a mortgage upon the lot in question, they then being the owners thereof in fee simple. One-half of the principal and a considerable portion of the interest of the indebtedness evidenced by this note and mortgage remains unpaid. On September 25, 1913, the Haydons executed and delivered to the Fremont State Bank their promissory note evidencing an indebtedness from them to it of $1,000. To secure this indebtedness, they, at the same time, executed and delivered to the bank a mortgage upon the lot in question. On March 27, 1917, the bank duly assigned and transferred this note and mortgage to Malm. On May 31, 1917, for the purpose of avoiding foreclosure of this mortgage, the Haydons executed and delivered to Malm a conveyance of the lot in the form of a quitclaim deed. This conveyance we assume, as counsel on both sides do, was intended to be in satisfaction of the mortgage indebtedness and that Malm gave no other consideration for the conveyance, though the allegations of the affirm-

ative answer and cross-complaint are not clear upon this question. At the time of receiving this deed, the mortgage which had been given by the Haydons to Mrs. Griffith had not been recorded in the auditor's office of King county, but was thereafter recorded therein on January 7, 1918. It is alleged in the amended affirmative answer and cross-complaint that the quitclaim deed was given "under and by virtue of the terms of a certain agreement providing for the redemption from said mortgage by the said Edward C. Haydon and Mary Alice Haydon, his wife, the more specific and definite terms of which said agreement are unknown to the defendant." It is further alleged in the amended affirmative answer and cross-complaint:

"That the defendant had no knowledge of the existence of said mortgage made by said Edward C. Haydon and wife to said Fremont State Bank, and had no knowledge of its assignment thereof to the plaintiff, and had no knowledge of the contract in relation to the foreclosure of said mortgage, and no knowledge of the existence or delivery of said quitclaim deed prior to the month of January, 1918. That, when the defendant learned of the existence of said deed and the facts in relation to the mortgage of said Fremont State Bank and the assignment thereof to the plaintiff, the defendant immediately endeavored to ascertain from the plaintiff the amount due the plaintiff upon his said mortgage and offered to tender to the plaintiff all moneys due to the said plaintiff by reason of said mortgage; that the plaintiff refused to disclose to the defendant the amount due to the plaintiff, and that the defendant was and is unable to tender to the plaintiff, by reason of said fact, the amount of money due the plaintiff under said mortgage; that the defendant is able, ready and willing to pay into court for the use and benefit of the said plaintiff all sums of money due under and by virtue of said note and mortgage, but that the said plaintiff refuses to accept any money from the defendant and claims to own said property."

It is contended in behalf of the appellant, Mrs. Griffith, that the respondent, Malm, having taken the quitclaim deed from the Haydons, whether taken as security or in payment of a prior existing mortgage debt due to him from them, he did not thereby become a *bona fide* purchaser of the lot for value, as against the right of Mrs. Griffith to redeem the lot from the claim of Malm made under his mortgage and quitclaim deed executed by the Haydons. We feel constrained to hold that this contention is well grounded under the facts as alleged in Mrs. Griffith's amended answer and cross-complaint. It seems to us that the respondent is in no better position than he would have been had he, at the time of taking the quitclaim deed to the lot from the Haydons, been the purchaser thereof at execution sale held under a court decree foreclosing his mortgage as against the Haydons. Under such a sale, Mrs. Griffith would have been entitled to redeem within one year thereafter (Rem. Code, §§ 594, 595), since manifestly she, in any event, became the holder of a mortgage against the lot, in effect, subsequent in time, because of subsequent recording, to the acquisition of the interest in the lot by Malm under the mortgage and quitclaim deed given him by the Haydons. It is plain from the allegations of the amended affirmative answer and cross-complaint that, in Mrs. Griffith's offer to, and demand made upon, Malm looking to redemption of the lot from the right and interest acquired therein by him under the mortgage and deed given to him by the Haydons, she did all that was required of her to secure her right of redemption. This was done by her well within one year after the receiving of the quitclaim deed by Malm from the Haydons.

It has become the settled law of this state, in harmony with the generally prevailing rule elsewhere, that

the mortgaging or conveying of property to secure a pre-existing debt does not confer upon the grantee the right of a *bona fide* purchaser for value, as against the right of those acquiring a prior interest in the property, though such acquired prior interests be unknown to the grantee. *McDonald v. Johns,* 62 Wash. 521, 114 Pac. 175, 33 L. R. A. (N. S.) 57; *Brace v. Superior Land Co.,* 65 Wash. 681, 118 Pac. 910; *Thomas v. Grote-Rankin Co.,* 75 Wash. 280, 134 Pac. 919; *Connecticut Investment Co. v. Demick,* 105 Wash. 265, 177 Pac. 676. This rule and the reason therefor is equally applicable to a lien claimed by a judgment creditor, even after he becomes a purchaser at execution sale held under his judgment, in any event, up until the time for redemption has expired, and he thereupon is given a sheriff's deed conveying absolute title to him in satisfaction of his judgment, or such portion thereof as his bid may represent. Whether he thereafter stands in the position of a *bona fide* purchaser for value, as against prior unknown and unrecorded claims or interests in the property so acquired by him, we may, for present purposes, regard as a debatable question. It is at least certain, under our decisions, that, until the time prescribed for redemption has expired, and absolute title vests in such a purchaser at execution sale, he is not a *bona fide* purchaser for value, as against the redemption right possessed by grantees and lienors who have acquired interests in the property prior to his judgment or lien upon which it rests, though he have no notice thereof, either actual or constructive. *Scott v. McGraw,* 3 Wash. 675, 29 Pac. 260; *Benney v. Clein,* 15 Wash. 581, 46 Pac. 1037; *Dawson v. McCarty,* 21 Wash. 314, 57 Pac. 816, 75 Am. St. 841; *Hacker v. White,* 22 Wash. 415, 60 Pac. 1114, 79 Am. St. 945; *Woodhurst v. Cramer,* 29 Wash. 40, 69 Pac. 501; *Rohrer v. Snyder,* 29 Wash. 199, 69 Pac. 748;

Bloomingdale v. Weil, 29 Wash. 611, 70 Pac. 94; *Lee v. Wrixon,* 37 Wash. 47, 79 Pac. 489; *American Savings Bank & Trust Co. v. Helgesen,* 67 Wash. 572, 122 Pac. 26, Ann. Cas. 1913A 390; *Ransom v. Wickstrom & Co.,* 84 Wash. 419, 146 Pac. 1041, L. R. A. 1916A 588.

We are of the opinion that the facts alleged in appellant's amended affirmative answer and cross-complaint, while not specific as to the period agreed upon within which the Haydons might redeem the lot from Malm, mean that the Haydons were to have at least the one year prescribed by statute within which to redeem, since it is alleged that the quitclaim deed was given "for the purpose of avoiding foreclosure of said mortgage"; and we are further of the opinion that no agreement could have been made between the Haydons and Malm, in connection with the giving and receiving of that conveyance, which would have taken away from Mrs. Griffith her right of redemption within one year following the execution of that conveyance. It follows that, since Mrs. Griffith is, in this action, seeking only to enforce her right of redemption as against the rights of Malm acquired under his mortgage and quitclaim deed, her amended affirmative answer and cross-complaint states a good defense and cause of action against Malm.

Contention is made in Malm's behalf that, because of the delay on the part of Mrs. Griffith in recording her mortgage, for a period of some eight years following its execution, she should now be denied the right of redemption, upon the grounds of laches in that regard on her part. This, we think, was not a delay available to respondent as laches on the part of Mrs. Griffith, in so far as her right of redemption is concerned. Were she seeking to make her mortgage superior to the mortgage and conveyance under which Malm claims, it is possible the question of her laches

would be of some moment. We see no effects flowing from the delay in the recording of Mrs. Griffith's mortgage other than to render it, in effect, a second or junior mortgage to Malm's mortgage.

We notice that, by the allegations of Malm's complaint and the denials of Mrs. Griffith's answer, there is put in issue the question of Malm's actual knowledge of the existence of Mrs. Griffith's mortgage when he received the quitclaim deed from the Haydons. While we have ignored this tendered issue in our discussion of what counsel have regarded as the real question here involved, we do not desire to be understood by this decision as eliminating that issue from the case. We are not deciding that it is admitted by the pleadings that Malm had no actual notice of the existence of Mrs. Griffith's mortgage. That is a question open to proof upon the trial under the pleadings, and if it be proven that Malm did have actual notice of Mrs. Griffith's mortgage when he received the mortgage and quitclaim deed from the Haydons, Mrs. Griffith would have at least the right of redemption which she is seeking to enforce in this action.

The order sustaining Malm's demurrer to Mrs. Griffith's amended affirmative answer and cross-complaint, and the judgment rendered against her upon her election to stand thereon and not further plead, are reversed, and the cause remanded to the superior court for further proceedings not inconsistent with the view herein expressed.

HOLCOMB, C. J., MAIN, MITCHELL, and MACKINTOSH, JJ., concur.

[No. 15612. *En Banc.* December 15, 1919.]

THE STATE OF WASHINGTON, *on the Relation of Bellingham School District No. 301, of Whatcom County, Plaintiff*, v. C. W. CLAUSEN, *State Auditor, Defendant.*[1]

SCHOOLS AND SCHOOL DISTRICTS (34)—BONDS—POWER TO ISSUE—CONDITIONS—STATUTES. After the taking effect on June 12 of Laws of 1919, p. 216, § 12, amending Rem. Code, § 4607, and providing that school district bonds for erecting permanent buildings shall be made payable in semi-annual installments, the school district has no power to issue or sell bonds payable in ten years, in conformity to the former law, notwithstanding the issue was authorized by an election and adjudged by a court to be valid before the amendment of 1919 took effect.

CONSTITUTIONAL LAW (72)—OBLIGATION OF CONTRACTS—CONTRACTS OF STATE AND SCHOOL DISTRICTS. Laws of 1919, p. 216, § 12, amending Rem. Code, § 4607, and changing the requirements as to school district bonds, did not impair the obligation of any contract as to contemplated bonds that had been previously authorized under the former law, where such bonds had not been issued or the state's bid therefor accepted prior to June 12, 1919, when the amendment took effect.

JUDGMENT (227, 229)—CONCLUSIVENESS — BAR — MATTERS NOT IN ISSUE OR WHICH COULD NOT HAVE BEEN ADJUDICATED. A judgment on the merits to the effect that a school district was legally authorized by vote of the electors to issue bonds conditioned in compliance with the law then in effect, entered prior to the taking effect of Laws of 1919, p. 216, § 12, amending Rem. Code, § 4607, is not an adjudication as to the right of the school district to issue and sell said bonds after the taking effect of the amendatory act which changed the requirements as to the conditions of the bond.

Application filed in the supreme court October 25, 1919, for a writ of mandamus to compel the state auditor to accept certain school district bonds and issue a warrant in payment therefor. Denied.

[1]Reported in 186 Pac. 319.

Kellogg & Thompson, for relator.

The Attorney General and *G. H. Bucey,* for respondent.

PARKER, J.—This is an original proceeding in this court, wherein relator school district seeks a writ of mandate directed to the defendant, state auditor, commanding him to accept negotiable bonds of the school district in the sum of $75,000, and also to issue to the school district in payment therefor a warrant for that amount against the permanent school fund of the state, in pursuance of a bid for such bonds made by the officers of the state authorized to invest the permanent school fund, and the acceptance of such bid by the directors of the school district. The auditor has refused to accept such bonds and issue a warrant in payment therefor, contending that, at the time of the tendering and acceptance of the bid, and at all times since then, the district has not possessed any legal authority to issue such bonds.

The controlling facts are not in dispute, and may be summarized as follows: On May 24, 1919, there was regularly held in the school district a special election, at which it was decided, by the required vote of the electors of the district, that the district borrow the sum of $75,000 and issue its negotiable interest-bearing bonds evidencing its indebtedness in that sum. To make certain just what the directors of the district proposed and submitted to the electors of the district, we quote from the complaint, as follows:

"On the 29th day of April, 1919, the board of directors of plaintiff and relator did, by resolution, duly resolve, among other things, that the sum of $75,000 be borrowed by said plaintiff and relator with which to provide more adequate facilities for said school district, by the erection of one or more school build-

ings to be used for school purposes in conjunction with the present school buildings upon the several sites owned by said school district, and to provide the school buildings of said district with necessary furniture, apparatus and equipment, and make betterments thereon, and to improve the school grounds surrounding said buildings, and to issue bonds therefor, such bonds to be payable in twenty years after the date of their issue, but the same to be payable and redeemable at the option of the said school district at any time after ten years from the date of their issue, and to draw a rate of interest not to exceed six per cent per annum, interest to be payable annually or semi-annually."

While this allegation of the complaint refers to the original resolution of the board of directors, other allegations of the complaint show that this was the proposition submitted to, and voted upon by, the electors. This proposition, and the adoption thereof by the electors, was in accord with the powers of the district as prescribed by § 4607, Rem. Code, as then in force, relating to the borrowing of money and issuance of bonds by school districts. The concluding language of that section, as then in force, and here to be particularly noticed, is as follows:

"the bonds so issued shall bear a rate of interest not to exceed six per cent per annum, interest payable annually or semi-annually, payable and redeemable at such time as may be designated in the bonds, but not to exceed twenty (20) years from date of issue."

Soon after that election, one Lee, a resident and taxpayer of the school district, commenced an action in the superior court for Whatcom county, seeking to have the directors enjoined from issuing any bonds as proposed and voted for, contending that there were irregularities in the calling and holding of the election rendering it void and of no effect. Thereafter, on June 6, 1919, that action came regularly on for hearing on

the merits in the superior court, when a judgment was rendered in that court denying the relief prayed for and deciding, in effect, that the election was regularly called and held, and that the directors could, in pursuance thereof, legally borrow money and issue bonds of the district in the sum of $75,000, as proposed by them and voted by the electors. Thereafter, on June 10, 1919, Lee appealed from that judgment to this court, wherein it was affirmed on July 3, 1919. *Lee v. Bellingham School District No. 301,* 107 Wash. 482, 182 Pac. 580. On June 12, 1919, there went into force and became effective an act of the legislature amending § 4607, Rem. Code, relating to the borrowing of money and the issuance of bonds by school districts, providing, among other things, as follows:

"All school district bonds shall be payable within a period of not to exceed twenty-three years from date, except when issued by districts of the first class for the purpose of acquiring building or playground sites, or of erecting buildings of a permanent character, in which case they shall be made payable in semi-annual installments, beginning the third year, over any period not exceeding forty years from date." Laws of 1919, page 216, § 12.

Relator is a school district of the first class; so it is plain that this quoted language of the amendatory act relates to the issuance of bonds by this district for the erection of buildings of a permanent character, which, we have seen, is the purpose for which at least a large portion of these bonds are proposed to be issued. Therefore the proposed bonds, if issued, will be materially different from bonds authorized to be issued by school districts of the first class for buildings of a permanent character under § 4607, as amended, in that such proposed bonds will not be "payable in semi-annual installments," as the section, as amended, pro-

vides such bonds shall be. On July 12, 1919, the directors of the district, upon invitation of bids for the purchase of the bonds proposed and voted to be issued, received and accepted a bid therefor made by the officers of the state authorized to invest the permanent school fund, such bid being made in behalf of that fund, which bid was, in substance, an offer to purchase the bonds at their face value, the bonds to bear interest at the rate of four and three-fourths per cent per annum. Thereafter, looking to the consummation of the sale of such bonds in compliance with that accepted bid, and the payment therefor from the permanent school fund, the directors of the district demanded of the state auditor that he accept such bonds and issue his warrant to the district against the permanent school fund in payment therefor. This the auditor refused to do, and thereafter the school district commenced this proceeding.

It is contended in behalf of the auditor that his acceptance of the bonds proposed and voted to be issued, for which the officers of the state authorized to invest the permanent school fund bid for the purchase of, and his issuance of a warrant in payment thereof, would be an illegal act on his part, in that such act would be the acceptance of and paying for bonds which the school district, at the time of accepting the bid, July 12, 1919, and at all times since June 12, 1919, the date of going into force of the amendatory act of 1919 (Laws 1919, p. 216, § 12), had no power to lawfully issue. We feel constrained to hold that this contention must be sustained.

It is elementary law that school districts, under our system of government, possess only such powers as may be conferred upon them by legislative enactment. Whether or not such districts shall possess the power to borrow money and issue negotiable bonds evidenc-

ing their debts so created, is wholly a matter of legislative will. It follows, as a matter of course, that such power may, by the legislature, be granted or withheld, and may, by the legislature, be taken away or limited after once being granted. Dillon, Municipal Corporations (5th ed.) §§ 106, 889. Such power of the legislature is subject only to the limitation that it shall not be exercised so as to impair the obligation of contracts. That no contractual rights of any nature accrued with reference to this proposed bond issue prior to the going into effect of the amendatory act on June 12, 1919, we think is too plain to admit of argument to the contrary. The proposed bonds were not issued or even offered for sale by the district prior to June 12, 1919. The bid for the bonds, made by the officers of the state authorized to invest the permanent school fund, was not accepted until July 12, 1919. Manifestly no contractual rights whatever in favor of the school district or the officers of the state seeking the purchase of the bonds as an investment of the permanent school fund could, in any event, have accrued until the acceptance of the bid, at which time the amendatory act of 1919 had been in full force and effect for a period of one month; which amendatory act expressly provides that:

"All school district bonds . . . when issued by districts of the first class for . . . erecting buildings of a permanent character, . . . shall be made payable in semi-annual installments, beginning the third year, over any period not exceeding forty years from date." Laws 1919, p. 216, § 12.

It seems to us that citation of authority is hardly necessary to support the view that, since the going into effect of the amendatory act, on June 12, 1919, this school district has not possessed the power to issue the bonds as proposed and voted, and that no

contractual obligations arose prior to the going into force of that act which could be impaired by giving it full force and effect from and after that date. We have, however, no less an authority than the supreme court of the United States supporting this view. In the case of *Town of Concord v. Portsmouth Savings Bank*, 92 U. S. 625, there was involved the question of the power of the town to make a donation in aid of a prospective railroad to run through the town. The donation was decided upon by the requisite vote of the electors of the town at an election held therein to determine the question, in pursuance of a statute of the state of Illinois then in existence. After the town had so decided to make the donation, but before the donation was actually made, the constitution of Illinois was so amended as to prohibit the making of such a donation. In that case the court squarely held that the power to make the donation was thus taken away from the town, although it was lawfully voted and could have been lawfully made but for the divesting of the town of the power to make it, before it was actually consummated; and the bonds of the town, issued to consummate the donation, after the town was divested of the power to make it, were held void. The decision of this court in *Seymour v. Tacoma*, 6 Wash. 427, 33 Pac. 1059, is in harmony with this view of the law. That case involved the constitutional debt limit of the city of Tacoma. When the issuance of the bonds was authorized, their total, if issued at that time, would have been within the constitutional debt limit of the city as measured by its then assessed valuation, but before the bonds were actually issued a new assessment became effective, and it was held that the new debt limit thereby created, being less than the former, would govern, and the total issue of the bonds limited accordingly. We are quite convinced that the school

district does not now possess the power to issue the bonds as proposed and for which the bid in question was made, and that the state auditor did his legal duty when he refused to consummate the proposed sale of the bonds by accepting them and issuing a warrant in payment therefor against the permanent school fund of the state.

Counsel for the school district now contend that the judgment rendered in the case of Lee against the district became *res judicata* and binding upon all of the taxpayers of the district as to the validity of the bonds proposed to be issued, and that the state auditor has no different rights in that behalf than a taxpayer of the district would have. Counsel invoke the general rule that, where a citizen and taxpayer brings an action in behalf of himself and all other taxpayers of the municipality, seeking the enjoining of the issuance of bonds of the municipality upon the grounds that the issuing of them would be illegal and void, and final judgment is rendered in such action, upon the merits, such judgment becomes final and binding upon all the taxpayers of the district as well as the district itself, citing *Stallcup v. Tacoma,* 13 Wash. 141, 42 Pac. 541, 52 Am. St. 25, and *State ex rel. Forgues v. Superior Court,* 70 Wash. 670, 127 Pac. 313. We may concede for present purposes, that the judgment in the *Lee* case became binding upon the district and all the taxpayers therein, and even upon the auditor, in so far as the power to issue the proposed bonds at the time, or any time prior to June 12, 1919, is concerned; but that, as we view it, will not aid the district in this case. That judgment was rendered in the superior court on June 6, 1919, and, as the law then existed, it was correct, as afterwards held by this court. Manifestly the question here involved, that is, the question of the power possessed by the school district after the

going into force of the amendatory act on June 12, 1919, was not, and could not have been, litigated in that action. The only question of power possessed by the school district determined by the judgment in that action, was the question of the power possessed by the school district at the time the judgment was rendered, which was before the amendatory act became effective. Nor does the fact that the decision of this court affirming the judgment of the superior court, rendered after the amendatory act of 1919 went into force, make the situation any different. The decision of this court was an affirmance of the judgment of the superior court as of the time that judgment was rendered. It was not a decision, and could not have been a decision, as to what power the school district possessed as to the borrowing of money and the issuing of negotiable bonds after the amendatory act became effective on June 12, 1919. (Laws 1919, p. 216, § 12.) We are of the opinion that the judgment in the *Lee* case was in no sense *res judicata* of the question we are here called upon to decide.

The writ is denied.

ALL CONCUR.

[No. 15556. Department One. December 15, 1919.]

CONCESSIONS COMPANY, *Appellant*, v. THOMAS N. MORRIS *et al.*, *Respondents*.[1]

TAXATION (2)—PROPERTY OF UNITED STATES—BUILDINGS AND FIXTURES ON MILITARY RESERVATION. Buildings erected and fixtures attached by a licensee at Camp Lewis under a contract with the commandant that they were to remain in case the licensee left the premises, belong to the United States and are not subject to taxation, in view of U. S. Const., art. 1, § 8, cl. 17, giving Congress exclusive legislation over places purchased for forts and other needful buildings by consent of state legislatures, and Rem. Code, § 6853, and Laws of 1917, pp. 2, 15, consenting to the acquisition of lands for military purposes and to the donation of Camp Lewis for a military reservation, and Rem. Code, § 9098, exempting from taxation all property of the United States.

SAME (21)—SITUS OF PROPERTY—PERSONAL PROPERTY IN MILITARY RESERVATION. Personal property on the Camp Lewis military reservation is not *in* but is *without* the state of Washington, within the meaning of Rem. Code, § 9101, providing for the taxation of personal property "in" the state of Washington; and is therefore not subject to state taxation.

UNITED STATES (1)—JURISDICTION—PROPERTY CEDED FOR MILITARY RESERVATION—CONDITIONS. The provision for the issuance of civil and criminal process from state courts over all tracts embraced in Camp Lewis (Laws of 1917, p. 14, § 20), does not make the absolute cession of exclusive jurisdiction to the Federal government contained in said act a conditional cession and is not inconsistent with the uses for which the property was acquired.

SAME. The cession of jurisdiction to the Federal government of Camp Lewis which was acquired by donation, rather than by purchase within U. S. Const., art. 1, § 8, may be accompanied by such conditions as the state may see fit to annex, if not inconsistent with the use for which the property was acquired; and the Federal government acquired such jurisdiction as was ceded.

Appeal from a judgment of the superior court for Pierce county, Fletcher, J., entered May 27, 1919, upon sustaining a demurrer to the complaint, dismissing an action to enjoin the collection of a tax. Reversed.

[1]Reported in 186 Pac. 655.

Revelle & Revelle, for appellant.

William D. Askren, Frank D. Nash, and *J. A. Sorley,* for respondents.

MACKINTOSH, J.—The superior court sustained the respondents' demurrer to appellant's complaint, which, in substance, alleged that the appellant is a Washington corporation, with its principal place of business in Seattle, King county, and that the respondents are the county of Pierce and its assessor, treasurer, and sheriff. The appellant has a concession to operate barber shops at Green Park, which is a portion of the Federal army post known as Camp Lewis. This concession was granted by the Camp Lewis Amusement Company, which holds a license and authority from the commanding officer at Camp Lewis, and, by the terms of the concession, the appellant had the right to construct and operate buildings according to plans and specifications approved by the commanding officer, and to pay said commanding officer a location fee and a privilege tax of ten per cent of the daily gross receipts of the concession; the concession further providing that all rights under it might be terminated by the commanding officer for breach of its terms or for military reasons; that the appellant should submit to the commanding officer's auditor its records and accounts, and should abide by the tariffs, charges, rates, prices and rules which the commanding officer may make from time to time. It was further provided that, if the appellant failed to operate the concession for five days, the commanding officer could command the appellant to vacate and, upon such order, the appellant would have seven days to take from the buildings his personal property, and during those seven days the appellant might sell the buildings to any one else holding a concession approved by the

commanding officer. If no such sale was made, the appellant's rights in the buildings terminated. The concession could not be assigned without the commanding officer's consent. The complaint then alleges that the appellant erected the buildings on the military reservation as provided in the contract; that the reservation is the property of the United States; that the buildings could not be removed therefrom; and that the appellant had only the right of use and occupation; that, in the buildings, the plaintiff had located personal property which is not within the jurisdiction of Pierce county or the state of Washington, but in the exclusive jurisdiction of the United States government. It is then alleged that the respondents assessed the buildings, fixtures and personal property for taxes for the year 1918, and that the officials of Pierce county are threatening to sell this property to collect the tax. The complaint then prays for an injunction against Pierce county and its officers, and asks that the assessments be cancelled of record. The respondents, by demurring, admit the appellant's allegation that the title to the reservation is in the Federal government, and that, therefore, the provisions of the act of 1917, hereinafter referred to, relating to the acquisition of such title, have been complied with.

This appeal presents for the determination of this court the question as to whether or not property interests of the appellant, located on the military reservation at Camp Lewis, are subject to taxation by the state as a part of the property within the state, the appellant claiming that this property, being situated on a military reservation, is within the jurisdiction of the United States, and not within the jurisdiction of the state of Washington or Pierce county.

The constitution of the United States, article 1, § 8, provides that:

"Congress shall have the power to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over *all places purchased by the consent* of the legislature of the state in which the same shall be for the erection of forts, magazines, arsenals, dockyards and other needful buildings."

The state of Washington, by § 6853, Rem. Code, consented to the acquisition by the United States of lands for military purposes, this act being in harmony with the Federal constitutional provision above quoted, and the act providing that:

"The jurisdiction of this state is hereby ceded to the United States of America over all such land or lands as may have been or may be hereafter *acquired by purchase or condemnation, or set apart by the general government* for any or either of the purposes before mentioned: Provided, that this state shall retain concurrent jurisdiction with the United States in and over all tracts so acquired or set apart as aforesaid, so far as that all civil and criminal process that may issue under the authority of this state against any person or persons charged with crimes committed, or for any cause of action or suit accruing without the bounds of any such tract, may be executed therein, in the same manner and with like effect as though this assent and cession had not been granted."

And in the following section, being § 6854, the legislature provided:

"The tracts, pieces or parcels of land so acquired or set apart, together with the tenements and appurtenances for the purposes before mentioned, shall be held exempt from taxation by the state of Washington."

The legislature in 1917, in chapter 3, and chapter 4, was dealing particularly with the Camp Lewis Reser-

vation, and in those chapters consented to the acquisition and granted exclusive jurisdiction to the Congress of the United States of the territory donated for a military reservation; § 20, ch. 3, being as follows:

"Pursuant to the Constitution and Laws of the United States, and especially to paragraph seventeen of section eight of article one of such constitution, the *consent* of the legislature of the State of Washington is hereby given to the United States to acquire, by *donation* from Pierce county, title to all lands herein intended to be referred to . . . and the consent of the State of Washington is hereby given to the exercise by the Congress of the United States of exclusive legislation in all cases whatsoever over such tracts or parcels of land so conveyed to it . . . provided, that all civil process issued from the courts of this state and such criminal process as may issue under the authority of this state, against any person charged with crime in cases arising outside of said reservation, may be served and executed thereon in the same mode and manner and by the same officers as if the consent herein given had not been made." Laws 1917, p. 14, § 20.

The state of Washington and its subsidiary municipalities have no right to assess and tax the lands, buildings and fixtures situated within the military reservation which are the property of the United States government, and it cannot be disputed that so much of such property as has been attempted by the respondents to be assessed against the appellant has been assessed wrongfully; under the contract, the buildings and fixtures being the property of the government and not of the appellant. The contract clearly provides that the buildings are to be of a permanent nature and to remain where constructed, and the contract especially provides against their removal by the appellant, whose only right was to their use and occupation, subject to the power of the commanding officer

to terminate that right at any time for military reasons. That right is also terminated by the cessation of the use by the appellant. Therefore, by express agreement in the contract, as well as by the common-law principle governing the construction of buildings upon lands of another and the attachment of fixtures thereto, the buildings and fixtures used by the appellant are the property of the United States. The Laws of 1915, ch. 131, p. 358 (Rem. Code, § 9098), expressly provide that "all property, whether real or personal, belonging exclusively . . . to the United States" shall be exempt from taxation. There then only remains a question of whether the appellant's personal property situated upon the reservation is subject to state and county assessment and taxation.

Under our law, Rem. Code, § 9101, only personal property *in* the state of Washington can be listed for taxation, and the question, therefore, must be answered by a determination of whether personal property situated upon this military reservation is *in* the state of Washington. It seems to us that the answer to this is clear, and that such property is *without* the state in both a jurisdictional and territorial sense, for, as we have seen by the constitution of the United States, and the act of the legislature of this state, both the military reservation itself and the jurisdiction and legislation over it have been granted to the United States, and thereby there has been created an independent sovereignty the territory of which is surrounded by the state of Washington, but over which the state of Washington has no jurisdiction. A territory has been created which resembles that of the District of Columbia, the only reservation being that the state of Washington can serve civil and criminal process therein on actions arising outside the reservation.

The supreme court of Massachusetts, in *Commonwealth v. Clary*, 8 Mass. 72, had before it the question of jurisdiction over the lands in Springfield *purchased* by the United States for the purpose of erecting an arsenal *by consent of the state*, and that court, through its chief justice, said:

"On facts agreed upon in this case we are of the opinion, that the territory on which the offence charged is agreed to have been committed, is the territory of the United States, over which the Congress have the exclusive power of legislation. The assent of the commonwealth to the purchase of this territory by the United States, had this condition annexed to it—that civil and criminal process might be served therein by the officers of the commonwealth. This condition was made with a view to prevent the territory from becoming a sanctuary for debtors and criminals; and from the subsequent assent of the United States to the said condition, evidenced by their making the purchase, it results that the officers of the commonwealth, in executing such process, act under the authority of the United States. No offences committed within that territory are committed against the laws of this commonwealth, nor can such offences be punishable by the courts of the commonwealth, unless the Congress of the United States should give to the said courts jurisdiction thereof.

"As a consequence of these positions, it is the opinion of the Court, that they have no cognizance of the offences charged in this indictment, and that the defendant must be discharged.

"An objection occurred to the minds of some members of the Court, that if the laws of the commonwealth have no force within this territory, the inhabitants thereof cannot exercise any civil or political privileges, under the laws of Massachusetts, within the town of Springfield. We are agreed that such consequence necessarily follows; and we think that no hardship is thereby imposed on those inhabitants; because they are not interested in any election made within the State; or held to pay any taxes imposed by its

authority, nor bound by any of its laws—And it might be very inconvenient to the United States to have their laborers, artificers, officers and other persons employed in their service, subjected to the services required by the commonwealth of the inhabitants of the several towns."

Cooley on Taxation (3d ed.), vol. 1, page 84, says:

"Persons and property not within the territorial limits of a state cannot be taxed by it. In such a case the state affords no protection, and there is nothing for which taxation can be equivalent. This rule is applicable . . . . to persons who reside on lands *purchased by or ceded to* the United States for navy yards, forts, . . . etc., where the state has reserved no other jurisdiction than that to serve process."

The case of *State of Indiana ex rel. Wolf v. Pullman Palace Car Co.,* 16 Fed. 193, defines the limits of the state power of taxation as being co-extensive with its sovereignty and reaches all the property in the state which is not within the jurisdiction of the Federal government, the court holding that, while the taxing power of the state is unlimited within its jurisdiction, it cannot, however, be exercised over persons or property beyond its territory or jurisdiction. To the same effect see *Central Railroad Co. of New Jersey v. Jersey City,* 70 N. J. L. 81, 56 Atl. 239; and *People ex rel. Hatch v. Reardon,* 184 N. Y. 431, 77 N. E. 970, 112 Am. St. 628, 8 L. R. A. (N. S.) 314; and the *Cleveland etc. R. Co. v. Pennsylvania (State Tax on Foreign-Held Bonds),* 15 Wall. (82 U. S.) 300, where the supreme court said:

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects."

The supreme court of the United States, in *Fort Leavenworth R. Co. v. Lowe,* 114 U. S. 525, discusses this question in a most exhaustive and interesting opinion by Mr. Justice Field, in the course of which he says:

"When the title is acquired *by purchase* by consent of the Legislatures of the States, the federal jurisdiction is exclusive of all State authority. This follows from the declaration of the Constitution that Congress shall have 'like authority' over such places as it has over the district which is the seat of government; that is, the power of 'exclusive legislation in all cases whatsoever.' Broader or clearer language could not be used to exclude all other authority than that of Congress; and that no other authority can be exercised over them has been the uniform opinion of Federal and State tribunals and of the Attorneys General.

"The reservation which has usually accompanied the consent of the States that civil and criminal process of the state courts may be served in the places purchased, is not considered as interfering in any respect with the supremacy of the United States over them; but is admitted to prevent them from becoming an asylum for fugitives from justice. . . .

"Thus, in *United States v. Cornell,* 2 Mass. 60, it was held by Mr. Justice Story, that the purchase of land by the United States for public purposes, within the limits of a state, did not of itself oust the jurisdiction or sovereignty of the state over the lands purchased; but that the purchase must be by consent of the legislature of the state, and then the jurisdiction of the United States under the Constitution became exclusive. . . .

"These authorities [cited in the opinion in preceding paragraphs] are sufficient to support the proposition which follows naturally from the language of the Constitution, that no other legislative power than that of Congress can be exercised over lands within a state purchased by the United States with her consent for one of the purposes designated; and that such consent

under the Constitution operates to exclude all other legislative authority.

"But with reference to lands owned by the United States, acquired by purchase without the consent of the State, or by cessions from other governments, the case is different. Story, in his Commentaries on the Constitution, says: 'If there has been no cession by the State of the place, although it has been constantly occupied and used under purchase, or otherwise, by the United States for a fort or arsenal, or other constitutional purpose, the state jurisdiction still remains complete and perfect;' and in support of this statement he refers to *People v. Godfrey,* 17 Johns. 225. In that case the land on which Fort Niagara was erected, in New York, never having been ceded by the State to the United States, it was adjudged that the courts of the State had jurisdiction of crimes or offenses against the laws of the State committed within the fort or its precincts, although it had been garrisoned by the troops of the United States and held by them since its surrender by Great Britain, pursuant to the Treaties of 1793 and 1794. In deciding the case, the court said that the possession of the post by the United States must be considered as a possession for the State, not in derogation of her rights, observing that it regarded it as a fundamental principle that the rights of sovereignty were not to be taken away by implication. 'If the United States,' the court added, 'had the right of exclusive legislation over the Fortress of Niagara they would have also exclusive jurisdiction; but we are of the opinion that the right of exclusive legislation within the territorial limits of any State can be acquired by the United States only in the mode pointed out in the Constitution, *by purchase, by consent of the Legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.*' The essence of that provision is that the state shall freely cede the particular place to the United States for one of the specific and enumerated objects. This jurisdiction cannot be acquired tortiously by disseisin of the state; much less can it be acquired by mere occupancy, with

the implied or tacit consent of the State, when such occupancy is for the purpose of protection.'

"Where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification; that if upon them forts, arsenals, or other public buildings are erected for the uses of the General Government, such buildings with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the state as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the general Government. Their exemption from state control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But when not used as such instrumentalities, the legislative power of the State over the places acquired will be as full and complete as over any other places within her limits.

"As already stated, the land constituting the Fort Leavenworth Military Reservation was not purchased, but was owned by the United States by cession from France many years before Kansas became a State; and whatever political sovereignty and dominion the United States had over the place comes from the cession of the State since her admission into the Union. It not being a case where exclusive legislative authority is vested by the Constitution of the United States, that cession could be accompanied with such conditions as the State might see fit to annex, not inconsistent with the free and effective use of the fort as a military post. . . .

"We are here met with the objection that the Legislature of a State has no power to cede away her jurisdiction and legislative power over any portion of her territory, except as such cession follows under the Constitution from her consent to a purchase by the United States for some one of the purposes mentioned. If this were so it would not aid the Railroad Company; the jurisdiction of the State would then remain as it

previously existed. But aside from this consideration, it is undoubtedly true that the state, whether represented by her Legislature, or through a convention specially called for that purpose, is incompetent to cede her political jurisdiction and legislative authority over any part of her territory to a foreign country, without the concurrence of the general government. The jurisdiction of the United States extends over all the territory within the States, and, therefore, their authority must be obtained, as well as that of the State within which the territory is situated, before any cession of sovereignty or political jurisdiction can be made to a foreign country. And so when questions arose as to the northeastern boundary, in Maine, between Great Britain and the United States, and negotiations were in progress for a treaty to settle the boundary, it was deemed necessary on the part of our government to secure the cooperation and concurrence of Maine, so far as such settlement might involve a cession of her sovereignty and jurisdiction as well as title to territory claimed by her, and of Massachusetts, so far as it might involve a cession of title to lands held by her. Both Maine and Massachusetts appointed commissioners to act with the Secretary of State, and after much negotiation the claims of the two states were adjusted, and the disputed questions of boundary settled. The Commissioners of Maine were appointed by her Legislature; and those of Massachusetts by her Governor under authority of an act of her Legislature. It was not deemed necessary to call a convention of the people in either of them to give to the commissioners the requisite authority to act effectively for their respective states. 5 Webster's Works, 99; 6 Id. 273.

"In their relation to the general government, the States of the Union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the General Government are essentially different from those of the State, they are not those of a different country; and the two, the State and general government may deal with each other in any way they may deem best to carry out the purposes of the Constitution. It is

for the protection and interests of the States, their people and property, as well as for the protection and interests of the people generally of the United States, that forts, arsenals, and other buildings for public uses are constructed within the States. As instrumentalities for the execution of the powers of the General Government, they are, as already said, exempt from such control of the states as would defeat or impair their use for those purposes; and if, to their more effective use, a cession of legislative authority and political jurisdiction by the State would be desirable, we do not perceive any objection to its grant by the legislature of the state. Such cession is really as much for the benefit of the State as it is for the benefit of the United States. It is necessarily temporary, to be exercised only so long as the places continue to be used for the public purposes for which the property was acquired or reserved from sale. When they cease to be thus used, the jurisdiction reverts to the State.

"The Military Reservation of Fort Leavenworth was not, as already said, acquired by purchase with the consent of Kansas. And her cession of jurisdiction is not of exclusive legislative authority over the land, except so far as that may be necessary for its use as a military post; and it is not contended that the saving clause in the act of cession interferes with such use. There is, therefore, no constitutional prohibition against the enforcement of that clause. The right of the State to subject the railroad property to taxation exists as before the cession."

That case establishes that property purchased by the Federal government within the state and by its consent for the purposes enumerated in the constitution is held by the government in its proprietary and sovereign capacity only when there has been a cession of sovereignty by the state; that property owned by the Federal government, of which it had both proprietary and sovereign jurisdiction prior to the admission of the state into the Union, is, after such admission, held by the Federal government only in its proprietary

capacity, unless the state, after its creation, cedes sovereignty, and that such cession of sovereignty may be as restricted as the state sees fit to grant; that property acquired by the Federal government without consent of the state, as by condemnation or otherwise, is held by the Federal government in its proprietary capacity only; that the various states can cede to the Federal government sovereignty over lands which are held in Federal proprietorship, with such limitations upon that cession of sovereignty as the state may impose, but that, where such cession of sovereignty is made to the Federal government of property acquired by the Federal government *by purchase* and with the state's consent and for the purposes enumerated in the constitution, the cession of the state's sovereignty must be complete.

To the point that, where land within the state is purchased by the Federal government for the purposes enumerated in the constitution with consent of the legislature, Federal jurisdiction of the same is exclusive of state jurisdiction, see *Sharon v. Hill,* 24 Fed. 726; *Martin v. House,* 39 Fed. 694. In *Bannon v. Burnes,* 39 Fed. 892, the circuit court of Missouri said:

"So the sovereign — the local state government — consented to this purchase by the superior government before it was made, and covenanted on its part that, when the United States should acquire the title of the owner, the jurisdiction of the state should cease over the property, and that of the United States should attach, with the single reservation of the right of entry for service of legal process. Then follows the covenant of assurance that, whenever the state obtained such property by purchase or grant, the property thenceforth should be forever 'exonerated from all taxes, assessments, and other charges, which may be levied or imposed under the authority of the state.' The taxing power is the attribute of sovereignty, and the exercise of the highest jurisdiction. As it is a

power to be exercised or forborne at the will of the sovereign having jurisdiction, it follows logically that the sovereign may cede away such right, and release the burden. And when the grant has been accepted by the general government, and the conditions of the purchase have been fully performed, such grant becomes a solemn compact, which the general government would not permit the state to violate. The term 'exonerated' was, presumably, employed in its ordinary acceptation; 'to be relieved of as a charge; to be discharged or exempted.' Be the contention of plaintiff's counsel correct, that the lien of the city government on this property, so far as the owner and all other persons were concerned, attached on the 1st day of January, 1879, yet under the city charter (section 4, art. 6) the fiscal year begins on the third Monday in April, which in 1879 was the 21st day of April. The assessment is made between the 1st day of January and the third Monday of April, and is delivered to the council at its first meeting of the fiscal year. The council then by ordinance proceeds 'to levy taxes for the fiscal year.' A copy of this, with the assessment books, is delivered to the auditor, who then extends the taxes, and delivers the tax-book to the collector on the 1st day of May. Sections 20, 21. From which it is manifest that the taxes for the year 1879 were not levied until after the 9th day of April, and after the United States had acquired title to the property by purchase. . . . The state, by the act of cession, covenanted, in effect, that when the government should purchase this property it would not thereafter make any levy; and if the state itself had proceeded as did the city to make a levy for the purpose of taxation, after the 9th day of April, 1879, this property would have been exonerated therefrom. The municipal corporation of Kansas City is an integral part of the state. It is but an adjunct of the state power, to aid in carrying out the ends of government. It is therefore no less an action taken by the state when done through the agency of a subordinate municipal corporation. When the superior sovereignty ceded away its right and jurisdiction to make this levy and sale,

it necessarily negatived and withdrew the power of its inferior, existing by its consent, and acting as one of its governmental instruments, to do that which itself could not."

In the case of *In re Ladd,* 74 Fed. 31, it was held that the state had no jurisdiction over crimes committed at Fort Robinson, the title to the land within the fort having been acquired from France in 1803, but when Nebraska was admitted to the Union in 1867, the land, then not being used for military purposes, passed into the jurisdiction of the state. In 1876, a military reservation was established there by the government, and in 1887 the legislature of Nebraska ceded jurisdiction of the reservation with certain conditions. The court held that the cession of jurisdiction created by the act of 1887 was legal, and when it went into effect the jurisdiction was wholly ceded to the United States, and until that exclusive jurisdiction is terminated by the Federal government ceasing to own or exercise control thereof or retrocedes it to the state, such cession was within the legislative power of the state, the court saying:

"Here we find that there were parties competent to contract; a subject-matter to be contracted about; an agreement reached, as evidenced by the adoption of the act of March, 1887, by the legislature of the state, and its acceptance by the United States; and a sufficient consideration, in the large outlay of money made by the United States in the enlargement of the post, and other improvements made on the reservation. . . . By the cession of jurisdiction contained in the act of March, 1887, the state had parted with the power of legislative control over the reservation, except in the matter of service of process, and in regard to roads and highways; and under the provisions of section 10, art. 1, of the constitution of the United States, the state could not abrogate the contract it had entered into with the United States."

State ex rel. Jones v. Mack, 23 Nev. 359, 47 Pac. 763, held that, where a state cedes to the United States exclusive jurisdiction of land purchased by consent for a public building, for all purposes except enforcement of "criminal laws of this state," there was no jurisdiction for the punishment of crimes on the reservation, but only the right to execute criminal process there for a violation of the laws of the state committed elsewhere within the state.

United States v. Bateman, 34 Fed. 86, recognizes the rule as set forth in the above cases, but distinguishes that case for the reason that therein the Federal government had retroceded to the state its jurisdiction over territory purchased by consent of the state for the location of a national home for disabled soldiers. In that case it is said:

"These observations are as applicable to the Presidio as to the Fort Leavenworth reservation, as will be seen by reference to the act admitting California. The only reservation relating to the public land affected the proprietary interest of the United States in the lands. That interest was to be in no way interfered with. There was no reservation whatever as to sovereignty, or governmental powers or jurisdiction. There was no distinction made in the act of admission between these lands and other lands constituting the public domain in California. There being no reservation of governmental powers or jurisdiction over the Presidio lands in the act admitting California into the Union, in the language of the supreme court in the case cited, 'the United States, therefore, retained, after the admission of the state, only the rights of an ordinary proprietor.' And, again, says the court; 'The consent of the states to the purchase of lands within them for the special purposes named is, however, essential, under the constitution, to the transfer to the general government, with the title, of political jurisdiction and dominion. Where lands are acquired without such consent, the possession of the United States,

unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor.' The United States were both proprietors and sovereigns of the Presidio lands till the admission of the state of California into the Union. By the act of admission, reserving only their proprietary right over these lands, they relinquished to the state their governmental or local sovereign right, and jurisdiction, and were thenceforth only proprietors in the sense that any natural person owning land is a proprietor. Having so relinquished their sovereign rights, that condition remains to this day, unless the state has in some way, either directly or by implication, receded to the United States its sovereign jurisdiction. This could be done by direct cession, or by consenting through its legislature to the purchase of land for such governmental purposes, and a purchase for such purposes in pursuance of such consent. Neither has been done in this instance. There is no act directly ceding the jurisdiction. By the act of 1852, we have seen, the legislature in the proper form consented that the United States might purchase lands for certain specific purposes, including military purposes. But these lands were not so purchased. They were owned by the United States before California became a state, and by her admission into the Union the sovereignty was relinquished."

Exum v. State, 90 Tenn. 501, 17 S. W. 107, 25 Am. St. 700, 15 L. R. A. 381, seems to hold contrary to the rule here announced, but in that case there was a dissenting opinion by Justices Lurton and Snodgrass, which weakens the effect of the main opinion, in itself ill-considered.

It is, of course, true that the Federal government may acquire any land which it may see fit by purchase, without the consent of the state or by the exercise of eminent domain. *Van Brocklin v. State of Tennessee,* 117 U. S. 151; *Chappell v. United States,* 160 U. S. 499.

The reservations, so often contained in the cession accompanying the consent for the Federal government

to obtain by purchase, that the process of the state courts may be served in the places purchased, in actions arising outside such places, is intended to prevent such reservations from becoming the asylums of fugitives from justice, and is not invalid as interfering with the exclusive jurisdiction of the United States. In the Federal constitutional section to which we have called attention (section 8, article 1), the cession of jurisdiction which is made to the Federal government in furtherance or in conformity with that constitutional provision is an absolute cession, but a provision such as our act of cession contains for the service of process within the purchased lands does not make the cession conditional.

United States v. Meagher, 37 Fed. 875, holds that, where lands within a state are acquired by the Federal government in other ways than by purchase with the consent of the state and there has been no cession of sovereignty, the jurisdiction of the Federal government will, in the exercise of its ownership, be free from such state interference, as that would impair the effective use of the property for the governmental purposes for which it was acquired.

In *Crook, Horner & Co. v. Old Point Comfort Hotel Co.,* 54 Fed. 604, the court says:

"It [the supreme court of the United States] held moreover, that where land is acquired by the United States in any other manner than by such *actual purchase,* with the *consent of the state,* attended by a cession from the state of all jurisdiction over it, there the clause of the constitution giving the power of exclusive legislation to congress, and giving exclusive jurisdiction to the United States, does not apply. The court held that in this class of cases the United States takes the lands only under such a tenure, limited or unlimited, as the state confers by each special act of cession, and that such title is to be dealt with by the

courts precisely as if the land had been ceded by the state to a private individual. . . . However much these decisions may have disturbed opinions previously entertained by the legal profession, they are the supreme law of the land, and must be enforced by the courts. An inspection of the act of cession of Virginia conveying to the United States the lands of Old Point Comfort, belonging to herself, *and not purchased by the United States with her consent,* from any other owner, and ceding jurisdiction over them, will show that the case falls within the ruling of the supreme court in the two cases of *Railroad Co. v. Lowe* and *Railroad Co. v. McGlinn,* and that Fortress Monroe is held by the United States, not subject to clause 17, § 8, art. 1, of the constitution [the section heretofore discussed in this opinion] but only by the tenure prescribed by Virginia's act of cession of March 1, 1821, and her governor's deed of cession of December 12, 1838. These acts contain quite a number of very material limitations of the power of the United States over the land at Old Point Comfort. . . ."

In *In re Kelly,* 71 Fed. 545, it was held that purchase of land in the state by the general government with the consent of the legislature does not *ipso facto* confer on the general government exclusive jurisdiction unless the purchase is for one of the purposes distinctly named in article 1, § 8, of the constitution, but in order that exclusive jurisdiction may be acquired over land taken for any other purpose, the consent of the state government and the cession of its jurisdiction must be declared unequivocally and it must appear conclusively that the state is ceding exclusive jurisdiction, in order to oust it completely of jurisdiction. See, also, *Ex parte Gaines,* 56 Ark. 227, 19 S. W. 602; *Barrett v. Palmer,* 135 N. Y. 336, 31 N. E. 1017, 31 Am. St. 835, 17 L. R. A. 720.

But the cession of jurisdiction to the Federal government over property not acquired as provided in

the constitution may be accompanied by such conditions as the state may see fit to annex, as long as those conditions are not inconsistent with the use of the property for the purposes for which it is purchased. *Territory v. Burgess,* 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808, and *Barrett v. Palmer* and *United States v. Bateman,* above. The *Burgess* case holds that the jurisdiction of the United States over Fort McGinnis Military Reservation was not exclusive for the reason that the reservation was a part of the territory of Montana, and that the Federal government possessed sovereignty as long as there existed territorial government. To the same effect, see *Rice & Quinette v. Hammond,* 19 Okl. 419, 91 Pac. 698, where the supreme court of Oklahoma held that the county taxing officers had a lawful right to levy and collect taxes on personal property belonging to private individuals located on the Fort Sill Military Reservation. It appears from the case that Oklahoma at the time was a territory and, as such, Congress had a right to legislate therefor, and Congress having granted the right to subject all property to taxation, it was immaterial that part of the property was located on a government reservation. The court said:

"Counsel have overlooked the fact that Congress has not only exclusive legislative control over military reservations in the territories, but it has legislative control of the territories themselves. The Fort Sill military reservation is within the organized county of Comanche and constitutes a part thereof. The persons and property within such reservation have the protection of the laws of the territory, and it is only equitable that the property therein not belonging to the United States should pay a part of the expenses of the same. If Congress had intended that the property on this or other reservations in the territory should not be taxed, it would have so declared, as it did with

reference to property of the United States and property belonging to certain Indians."

As was decided in *Fort Leavenworth R. v. Lowe,* above, the legislatures of the various states have power to cede sovereignty to the Federal government of any territory within the state, and it appears from the record in this case that the title to the property here in question had been donated to the Federal government by Pierce county, and the state having the power to cede exclusive jurisdiction thereover, or with such reservations as the legislature might desire to make, it follows that the Federal government by such cession, made by the state confirming the donation of Pierce county, acquired such jurisdiction as was ceded. Were this a case where Camp Lewis had been purchased by the consent of the state, the legislature could have only ceded exclusive jurisdiction subject to the modifications we have noted, that is, that the state could have reserved the right to serve civil and criminal process in actions arising out of the Federal reservation.

It is to be borne in mind that we are not here concerned with the question of whether the personal property owned by the appellant might or might not be assessed and taxed against it at its place of residence within the state.

The rule here announced does not conflict with those cases, among which is *Page v. Pierce County,* 25 Wash. 6, 64 Pac. 801, which allow the taxation of property on Indian reservations, as there is no question but that such property is territorially within the confines of the state, nor does this opinion conflict with the right of the state to assess and tax improvements upon public lands, which improvements have been construed as personal property for the purposes of taxation. *Percival v. Thurston County,* 14 Wash. 586, 45 Pac. 159.

From the foregoing considerations, it appears that the demurrer should have been overruled, and for that reason the judgment of the lower court is reversed.

HOLCOMB, C. J., PARKER, MITCHELL, and MAIN, JJ., concur.

[No. 15018. *En Banc.* December 16, 1919.]

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Appellant*, v. FRYE & COMPANY *et al.*, *Respondents*.[1]

CARRIERS (47)—LIVE STOCK—RATES—CONTRACTS—CONSTRUCTION—RESHIPMENTS FROM CONCENTRATION POINTS. Under a tariff contract for the shipment of hogs in single-deck cars to concentration points and billed through, but to be reshipped without rebilling for a long haul in double-deck cars in the ratio of three for each two single-deck car loads, the company cannot recover on the basis of the number of single-deck cars, where, owing to underloading thereof, there were more single-deck cars than three to each two double-deck car loads; but can only recover for the services rendered, which would be the local rate to concentration points on the excess of single-deck cars.

SAME (47)—LIVE STOCK—RATES—ABANDONED CARS AT CONCENTRATION POINTS. In the absence of a tariff provision covering the matter of freight shipped to concentration points, but billed through and reshipped without rebilling for a long haul in a less number of cars, the company can recover only the reasonable value of the services, which would be the local rate to concentration points upon cars there abandoned.

SAME (47)—LIVE STOCK—RATES—CONTRACT—ADDITIONAL SWITCHING CHARGES. A contract naming the tariff on through shipments of stock to be delivered at a point where the company had no terminals does not entitle the company to collect, in addition, switching charges, where the shipper stood ready to accept delivery at any point in the city, and the company elected to deliver at the shipper's yards because the switching was less expensive than at other points.

LIMITATION OF ACTIONS (38-1) — ACCRUAL — "OPEN ACCOUNTS." There was no "mutual, open and current account" between a shipper and a carrier, within the meaning of Rem. Code, § 166, tolling the

[1]Reported in 186 Pac. 668.

statute of limitations, where shipments were made during a period of years, and bills were presented from time to time, and the shipper refused to pay particular items or paid less than the amount claimed on disputes and misunderstandings arising as to the amounts due on the shipments.

COMMERCE—INTERSTATE RATES—EFFECT ON STATE STATUTE OF LIMITATIONS. The interstate commerce law requiring a carrier to collect rates fixed by the tariffs without discrimination does not defeat the operation of state statutes of limitations on the ground that interposition of the statute would nullify the Federal act.

LIMITATION OF ACTIONS (17-1)—IMPLIED CONTRACTS NOT IN WRITING—FREIGHT TARIFFS. An action by a carrier to recover freight charges provided by the published tariffs required by the interstate commerce law, arises on contract, express or implied, which, if the contract is not in writing, must be commenced within three years under Rem. Code, § 159; and is not a statutory action which would be barred in two years, notwithstanding the terms of an interstate shipping contract are largely fixed by law (HOLCOMB, C. J., dissenting).

Cross-appeals from a judgment of the superior court for King county, Jurey, J., entered April 10, 1918, upon findings favorable to the defendant, in an action by a carrier to recover freight charges, tried to the court. Affirmed.

Geo. W. Korte and *C. H. Hanford,* for appellant.

Higgins & Hughes (*Hyman Zettler,* of counsel), for respondents.

TOLMAN, J. — The plaintiff sues to recover money alleged to be due for freight on shipments of hogs, cattle, and corn accompanying for feeding purposes, and switching charges accruing during the years 1909 to 1914, both inclusive. Both parties have appealed from the judgment below, and to avoid confusion will be referred to as plaintiff and defendant, respectively. It was announced on oral argument here that the matters in dispute as to the freight on corn, which accompanied the shipments of stock for feeding purposes,

had been adjusted, and therefore that matter will not be further considered or referred to herein.

The questions now to be determined, are:

(1) What was the legal rate to charge as freight on the shipments of hogs?

(2) What was the legal rate to be charged as freight on the shipments of cattle?

(3) Is the plaintiff entitled to charge and collect switching charges, or is that a part of the service covered by the through rates?

(4) Do the transactions shown constitute a mutual, open and current account with reciprocal demands between the parties, as defined in our statute, Rem. Code, § 166?

(5) Is the statute of limitations applicable, and if so, to what extent?

I. To determine what was the legal rate to be charged as freight on the shipments of hogs, the tariffs established by the plaintiff and filed with the interstate commerce commission must be considered in the light of the transactions as shown by the evidence. It appears that defendant and its predecessors had been, for a number of years, engaged in the operation of a slaughtering and packing business in the city of Seattle, and was a large shipper of live stock from points where produced to its plant, and prior to the transactions herein involved, it had purchased such live stock in territory not entered by plaintiff's road, and shipped by other lines. The plaintiff, having opened up a large territory in the Dakotas, and by its through line made shipments therefrom to Seattle feasible, sought the defendant's business, and to procure it established and duly filed certain tariffs, among others, a tariff for the shipment of hogs which provided for concentration points in South Dakota; for through rates from all loading points east of, and in

the same zone as, the concentration points, to Seattle, of $170 for each single-deck car, with the privilege of unloading, feeding and concentrating at such concentration points, and reloading in double-deck cars in the ratio of three single-deck cars to two double-deck cars, the rate on the double-deck cars to be, for each two, three times the rate on one single-deck car, and also established, by the same means, local rates from the loading places to the concentration points.

The practical operations, as found by the trial court, and as established by the evidence, are substantially these: Defendant placed buyers at the concentration points, who, by telephone or letter, communicated with producers at the various loading stations, and induced them to ship their hogs in single-deck cars billed to defendant at Seattle, but with directions to unload and feed at one of the concentration points, the shipper signing a live stock contract. When the car so billed reached the concentration point, it was unloaded in plaintiff's stock-yards, and its contents commingled with the hogs arriving from other loading points, so that the identity of each initial shipment was then lost. After feeding and resting, and as sufficient hogs were assembled, they were reloaded in double-deck cars and carried through in train-load lots to Seattle. These double-deck cars were each loaded to the required weight, each two equal to the load of three single-deck cars, but not overloaded, from the common pen, without regard to the number of single-deck cars in which the hogs had actually arrived, and were sent on to Seattle without rebilling, on the way-bills previously issued on the single-deck cars at the station where loaded, each two double-deck cars carrying with them way-bills for three single-deck cars, and earning the freight rate of such three single-deck cars from the loading point to Seattle.

Because of the partially developed hog industry, it was not always possible to secure full single-deck car-loads at the loading points, and in many instances, on account of such under loading and small cars, the actual contents of four or more single-deck cars were put into two double-deck cars at the concentration points, without, in fact, loading such double-deck cars beyond what the tariff called for, *i. e.*, three single-deck car-loads in two double-deck cars. This resulted in an excess of single-deck cars, over the ratio of three to two, at the concentration points, all billed to Seattle, and each billed with the tariff freight rate through to Seattle, but none of which traveled beyond the concentration point, their loads having gone on in the double-deck cars without overloading.

The way-bills for these extra cars were sent on to Seattle, presented to the defendant, with a demand for payment of the through rate on each, and payment being refused, they form the basis for plaintiff's demand on this branch of the case. The defendant in the beginning claimed that nothing whatever was due the plaintiff upon these excess cars, but finally an adjustment was reached by which it was mutually agreed that defendant should pay the local rates from the loading point to the concentration point upon each of these excess cars; but the plaintiff's accounting department repudiated this agreement, and by this action it is sought to establish a construction of the tariff which will require the payment of $170 for each single-deck car billed from any loading point to Seattle, notwithstanding that it traveled only to a concentration point, and regardless of the ratio in which the contents of such cars were reloaded into double-deck cars at the concentration points.

Experts testified upon each side as to the proper interpretation of the tariff, and after a full consider-

ation of such testimony, we are inclined to approve and adopt the view taken by the trial court so clearly expressed in his memorandum opinion, as follows:

"I think, upon the whole record, the tariffs in question were framed to meet a condition existing in the locality in question—a sparsely settled country where it was frequently and usually impossible to procure a full single-deck car load of hogs at any one loading station. This made the concentrating feature of the tariff at concentrating points most convenient to the loading points and re-loading in double-deck cars for the long haul to Seattle a matter of necessity to the handling of such shipments. Plaintiff's interpretation of the law renders this agreement of no benefit to the shipper, although it is conceded that the arrangement was for the benefit of the shipper. Defendant's contention in this regard is certainly the most equitable, reasonable and practical, and if not illegal, should be accepted. As to the legality of the arrangement contended for by defendants, I think the defendants have the advantage in expert testimony, especially in view of the fact that one of plaintiff's experts, the author of the tariffs in question and who knew the conditions the tariffs were made to fit, at first interpreted the tariff as defendants contend for, and was one of the responsible parties for the compromise agreement, and such agreement was based upon his interpretation of the tariff at that time. I think, also, the same result is arrived at from an entirely different view of the matter. It is conceded the service and not the billing or bill of lading is the basis of the freight charges. The plaintiff's contention in this regard is based upon the billing and bill of lading rather than the service actually rendered. Take, for example, the case of three full single-deck car load lots shipped in four single-deck cars from the loading point to the concentration point, and there re-loaded into two double-deck cars and forwarded to Seattle, which is a fair example of the subject of the controversy on this question. It will be conceded that the service called for and undertaken, according to the billing and bills

of lading, was to haul four single-deck cars from the loading point through to Seattle. Though plaintiff admits that this service was not rendered, yet it is for this specific and identical service that it demands payment rather than for the substituted service, which was actually rendered—the hauling of four single-deck cars from the loading point to the point of concentration, and there re-loaded into two double-deck cars and forwarded to Seattle, thus abandoning one single-deck car at concentration point. The full local rate on the abandoned car seems to me all that plaintiff could properly claim."

II. Practically the same questions are involved in the matter of freight on cattle, except that there is no tariff provision for concentration at particular points, or at all. As a matter of fact, concentration was permitted and the extra car was abandoned at the point where the concentration was made. In the absence of any tariff provision covering the matter, the plaintiff would be entitled to receive the reasonable value of the service rendered, and we uphold the trial court in its holding that the reasonable value of the service was the through rate on the loads which were shipped through, and the local rate on the abandoned car from the loading point to the point where the car was unloaded and abandoned.

III. Plaintiff seeks to recover for switching charges which it alleges it paid to another company for switching the cars containing the live stock shipped to the defendant, from its own line in Seattle to the defendant's yard. It is an admitted fact that the plaintiff had no terminal facilities of its own for the delivery of live stock in Seattle, and yet it had undertaken to make delivery at Seattle. Defendant, in writing, advised the plaintiff that it was ready to accept delivery at any point in Seattle where delivery could properly be made, and, under the circumstances,

the plaintiff voluntarily elected to make delivery at the defendant's yards, as being less expensive to it than making delivery at any other yards in Seattle. So that, excepting for the three cars resting upon a different state of facts, for the switching of which defendant admits a liability of $9, we hold that the plaintiff was compensated for this service by the through rate and is not entitled to recover switching charges in addition thereto.

IV. The plaintiff's complaint is framed upon the theory that this is a mutual, open and current account, and therefore the statute begins to run only from the last item. It may be admitted that the services were sufficiently continuous, but we see little else to bring it within the statute. The course of dealing is shown by a witness produced by plaintiff, who said, in effect, that as the shipments were received by defendant, the freight bills were presented and the defendant paid such of them, or such parts of them, as it admitted to be correct, and any that were disputed were rejected and returned unpaid to the collector; that no credit was allowed to be extended, and no credit was extended; but the simple fact that, from time to time, there were disputes or misunderstandings as to the amount due upon a freight shipment, and the defendant refused to pay a particular item, or paid less than the amount claimed, and that this is an action embracing all such separate and individual items, does not make it "a mutual, open and current account" within the statute. *Garey v. Pasco,* 89 Wash. 382, 154 Pac. 433; 1 R. C. L. 205; 1 C. J. 598.

V. The final question in the case, and the one to which each party has given most of its attention, is the application of the statute of limitations.

It is argued that, because the interstate commerce law requires a carrier to collect, and a shipper to pay,

the rates fixed by the tariffs, and forbids any manner of discrimination in favor of or against any shipper, the interposition of the statute nullifies the intent of the Federal law and permits its purpose to be set at naught. This question has been recently considered and the authorities reviewed by the circuit court of appeals for the eighth circuit, in *Chicago & N. W. R. Co. v. Ziebarth,* 245 Fed. 334, and resolved against the plaintiff's contention, and we are content to follow the rule there laid down.

Since, then, the state statute applies, within what provision of that statute do these matters fall? The six-year provision relates to an action upon a contract in writing, or to liability arising out of a written contract. If we properly grasp the facts here involved, this provision of the statute does not apply, because the only written contracts in anywise relating to the payments of freight charges shown by the record are the live stock contracts signed by the shipper of the hogs at the loading points, by the terms of which such shipper agreed to pay the tariff rate from the loading point to Seattle. Defendant was not a party to any such contract, and even though it were a party thereto, as we have already seen, that contract was not carried out in the particular instances which give rise to this litigation, but the loads of such cars were transferred properly to double-deck cars, which carried the through rate from the loading points to Seattle, in the ratio of three single-deck cars to two double-deck cars, and the through freight thereon was paid on presentation of the way-bill, leaving unpaid only the local rate on the excess single-deck cars from the loading station to the point of concentration. There being no written contract covering this local service or the local rate, it would seem to fall under

subd. 3, § 159, Rem. Code, as a contract or liability, express or implied, not in writing.

While it may be admitted that, under the interstate commerce law as it now stands, the terms of a contract between a shipper and a carrier are largely fixed by law, yet, notwithstanding that fact, a contract is entered into between the parties whenever the one delivers his goods to the other and the latter accepts them for transportation, and the limitation period is to be determined from the fact that the parties reduce their agreement to writing or permit it to rest in parol, and such is the meaning of this court in *Oregon-Washington R. & Nav. Co. v. Seattle Grain Co.*, 106 Wash. 1, 178 Pac. 648, and since the relations between the shipper and the carrier are contractual, the matter of freight rates cannot fall within the two-year limitation.

From what has been said, it follows that the trial court was right in all except the application of the two-year statute of limitations, and erred only in not applying the three-year statute.

The question of the freight on corn having been eliminated, it would appear from the record that this error does not affect the results, since the last delivery of hogs was made on September 21, 1911, and the last delivery of cattle made on June 30, 1911, and this action was not commenced until August 13, 1915.

The judgment of the trial court will therefore be affirmed.

PARKER, MACKINTOSH, BRIDGES, MOUNT, MITCHELL, MAIN, and FULLERTON, JJ., concur.

HOLCOMB, C. J. (concurring)—I fully concur in the foregoing opinion in all things except the reasoning and the ruling upon the application of the proper statute of limitations. The *Ziebarth* case cited, and

other Federal cases, declare the obligations arising between the parties are purely statutory and in no-wise contractual. Hence, manifestly the two-year statute of limitations, and not the three-year, should apply.

[No. 15382. Department One. December 16, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES SCHLUTER, *Appellant*.[1]

CRIMINAL LAW (440)—APPEAL—DISCRETION—SENTENCE AND PUNISHMENT. Abuse of discretion in imposing the maximum sentence allowed by law cannot be asserted in the absence of any record other than the information, plea of guilty, and judgment.

Appeal from a judgment of the superior court for Adams county, Truax, J., entered November 13, 1918, upon a trial and conviction of violating the prohibition law. Affirmed.

G. E. Lovell, for appellant.

Otto W. Naef, for respondent.

MITCHELL, J.—Appellant plead guilty to a charge, by an information filed in the superior court, of having in his possession an excessive amount of intoxicating liquor, in violation of § 6262-22, Rem. Code, was fined $250 and sentenced to ninety days in the county jail, and has appealed.

His only complaint is the severity of the judgment entered. The penalty provided by the law for the crime in question is:

"A fine of not less than fifty dollars nor more than two hundred fifty dollars, or by imprisonment in the county jail for not less than ten days nor more than

[1]Reported in 186 Pac. 267.

three months, or by both such fine and imprisonment." Rem. Code, § 6262-31.

If a consideration of what this court has said in the cases of *State v. Bliss,* 27 Wash. 463, 68 Pac. 87; *State v. Newton,* 29 Wash. 373, 70 Pac. 31; *State v. Van Waters,* 36 Wash. 358, 78 Pac. 897; *State v. Patchen,* 37 Wash. 24, 79 Pac. 479; *State v. Kenney,* 83 Wash. 441, 145 Pac. 450, as to the power of this court to modify such a sentence and judgment because of its supposed severity, is not conclusive against the present appeal, assuredly we must decline to review it because of the absence of any record other than the information, plea of guilty, and the judgment. The law charges upon the trial judge the duty to determine the punishment to be imposed, not according to an arbitrary penalty fixed by the law, but according to a minimum and maximum pecuniary punishment or imprisonment, or both, requiring the exercise of discretion, the expression of which, if within the terms of the law, is impressed with all legal presumptions in its favor, and is not to be disturbed by a challenge based simply upon the contention of the guilty one that the punishment imposed is in excess of what he thinks it should be.

Judgment affirmed.

HOLCOMB, C. J., MACKINTOSH, PARKER, and MAIN, JJ., concur.

[No. 15430. Department One. December 16, 1919.]

J. A. COLEMAN, *Respondent*, v. SEATTLE NATIONAL BANK, *Appellant*, H. K. SPALDING *et al.*, *as Spalding Fruit Company, Interveners and Appellants.*[1]

PRINCIPAL AND AGENT (36½) — AUTHORITY — NEGOTIABLE INSTRUMENTS—INDORSEMENT. Authority to indorse checks payable to a fruit company is not conferred by a statement certifying that the agent was authorized to "transact any and all business" for the company, in the absence of any circumstances touching the nature of the business from which the power might be implied.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 12, 1919, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Reversed.

A. W. Buddress, for appellants.

Julius A. Coleman, per se.

PARKER, J.—The plaintiff, Coleman, commenced this action in the superior court for King county, seeking recovery from the defendant bank upon a check drawn by the Chauncy Wright Restaurant Company against the bank, in favor of the Spalding Fruit Company, which check was thereafter indorsed and transferred by one Towse, assuming to act as agent for the fruit company, to the American Railway Publishing Company, and thereafter indorsed and transferred by Towse, assuming to act as the agent for the publishing company, to the plaintiff, Coleman. The fruit company intervened in the action, claiming ownership of the check and that Towse had no authority to so transfer it. The bank refused to pay the check upon its presentation by Coleman, because of a request of

[1]Reported in 186 Pac. 275.

the fruit company not to pay it, and the claim of the fruit company that Towse had no authority as its agent to indorse or transfer the check. Trial before the court without a jury resulted in findings and judgment awarding to Coleman recovery upon the check, both as against the bank and the intervening fruit company. From this disposition of the case, the bank and the fruit company have jointly appealed to this court.

The controlling facts may be summarized as follows: On June 22, 1918, the restaurant company drew its check in usual form for $293.15 against its deposit account in the bank, payable to the order of the fruit company. The check went into the possession of Towse, and we may assume, for present purposes, that it was properly in his possession as the agent of the fruit company. The check appears to have been given in payment for certain invoices of eggs. The record is silent as to Towse having anything to do with the sale of the eggs, or as to the nature of his relationship to the fruit company, or as to any other transaction had by him with or for the fruit company; save and except only as his relation to the fruit company is evidenced by a writing reading as follows:

"Yakima, Washington, June 12, 1918.

"To whom this may be presented,

"This is to certify that the bearer, Mr. R. S. Towse, is an authorized representative of the Spalding Fruit Company, and is hereby authorized to transact any and all business for said company.

"Spalding Fruit Company
"Per H. K. Spalding, Manager."

On June 24, 1918, the check, evidently while in Towse's possession, was certified by the bank, as follows: "Good when properly endorsed," these words being stamped across the face of the check and signed

by the bank's assistant cashier. Thereafter, on the same day, Towse, assuming to act as agent for the fruit company, transferred the check to the publishing company, making an indorsement on the back thereof as follows: "Spalding Fruit Co., by R. S. Towse." Thereafter, on the same day, the check was delivered by Towse to Coleman, an indorsement being made on the back thereof as follows: "American Ry. Pub. Co., by C. E. Melville, Treasurer, R. S. Towse, Mgr." The consideration for the transfer of the check by Towse to the publishing company, according to Towse's testimony, was a debt due from a member of the partnership doing business as the Spalding Fruit Company to the publishing company for shares of capital stock of the publishing company theretofore subscribed for by a member of that partnership. However, the consideration for that transfer was unknown to Coleman. The consideration for the transfer of the check by the publishing company to Coleman was indebtedness owing to Coleman from the publishing company for services theretofore rendered by him as its attorney, and the sum of $50 in money paid by Coleman to the publishing company. Towse took the check to Coleman, offering it to him in part payment for his services, except $50 of the amount thereof which he requested Coleman to pay to the treasurer of the company in money, which payment was made by Coleman accordingly. Before receiving the check, Coleman asked Towse by what authority he indorsed the check for the fruit company, and thereupon Towse produced the above quoted writing, asserting that to be his authority for so indorsing the check. Coleman had no knowledge whatever of the relationship of Towse to the fruit company, or of his authority to act for the fruit company, other than as contained in this writing then produced by Towse, and Coleman relied wholly

upon this writing as evidencing Towse's authority to indorse the check for the fruit company. Indeed, there is nothing in this record throwing any light on Towse's authority in that behalf, other than this writing. Towse was, at all times in question, the president, manager, one of the trustees, and a stockholder of the publishing company, it being a corporation, all of which was well known to Coleman at the time and long before he received the check. The check was, soon after the receiving of it by Coleman, presented to the bank in Coleman's behalf, that is, by the bank he had deposited it with for collection, and payment thereof refused because of the request made in that behalf by the fruit company and its claim of want of authority on the part of Towse to indorse or transfer the check. Thereafter this suit followed, with the result as above stated.

It is apparent from the trial court's findings and conclusions that its decision was rested upon the theory that the writing above quoted, signed by the fruit company, evidenced the conferring of authority upon Towse, as its agent, to transfer by indorsement and delivery its title to the check in question. This, it is contended by appellants, bank and fruit company, is an erroneous view of the law.

Looking to the seeming broad and comprehensive character of this writing as an agency appointment, without thought of that particular branch of the law of agency touching the execution and issuance, and the transfer by indorsement—and thereby, in effect, the issuance—of negotiable paper by an agent for his principal, the writing might seem to confer upon Towse authority to indorse and transfer the check to the publishing company; but we think a consideration of this branch of the law of agency will readily render it plain that the language of this agency writing, as

general and seemingly broad as it is, did not confer upon Towse the authority to so indorse and transfer the check. It takes something more than such general language to create such an agency. This because of the peculiar nature of negotiable paper and the rights and liabilities arising from its issuance. In 1 Mechem, Agency (2d ed.), at § 969, that learned author says:

"The power to bind the principal by the making, accepting or indorsing of negotiable paper is an important one, not lightly to be inferred. The negotiable instrument, in our law, is a contract which stands upon an independent footing. It is designed by its nature to circulate freely in the business world, and may come to persons and places far remote from those of its creation. It may confer upon a subsequent holder rights which the original holder did not possess, and its transfer may impose upon the maker obligations, against which his defenses are unavailing. The authority to create such obligations is obviously a delicate one, easily susceptible of abuse, and, if abused, bringing disaster and financial ruin to the principal. Our law therefore properly regards such an authority as extraordinary, and not ordinarily to be included within the terms of general grants; and the rule is absolutely established that it can exist only when it has been directly conferred or is warranted by necessary implication."

We are quite unable to see any implication arising from the language of this writing alone, suggesting that Towse possessed this extraordinary agency power, and we are to remember that there is nothing in this record showing any extraneous circumstances touching the nature of the business he was supposed to or did transact for the fruit company from which any such implication can be drawn. In the text of 2 C. J. 636, the law is well stated, as follows:

"Commercial paper, such as bills, notes, and checks, passes current to a limited extent like money, and accordingly power to an agent to execute or indorse it

is to be strictly limited, and will never be lightly inferred, but ordinarily must be conferred expressly. The most comprehensive grant, in general terms, of power to an agent conveys no power to subject the principal to liability upon such paper unless the exercise of such power is so necessary to the accomplishment of the agency that such intent of the principal must be presumed in order to make the power effectual."

This statement of the law finds support in numerous decisions of the courts cited thereunder. 1 Daniel, Negotiable Instruments (6th ed.), § 292; Tiedeman, Commercial Paper, § 77; 31 Cyc. 1381.

We conclude that this writing, signed by the fruit company and exhibited by Towse to Coleman as evidence of his authority for indorsing and transferring the check to the publishing company, there being no surrounding circumstances indicating any necessity for Towse making such assignment in the accomplishment of his agency duties, did not give him the power to indorse and transfer the check as agent for the fruit company, and that Coleman had no right to assume that he had such power. It follows that the judgment of the trial court must be reversed, Coleman denied recovery thereon, and the fruit company adjudged to be the owner of the check. The cause is remanded to the superior court with directions to enter judgment accordingly.

Since the check was introduced in evidence in this case, and is attached to the statement of facts therein on file in this court as exhibit A, the clerk of this court is directed to return the check to the clerk of the superior court to the end that it may be delivered to the Spalding Fruit Company, upon the entry of judgment by the superior court as herein directed.

HOLCOMB, C. J., MAIN, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 15471. Department One. December 16, 1919.]

FRED H. HEATH, *as Administrator etc., Appellant,* v. H. D. WYLIE *et al., Respondents.*[1]

STREET RAILROADS (20)—COLLISION AT CROSSING — CONTRIBUTORY NEGLIGENCE OF AUTOMOBILE DRIVER. The driver of an automobile struck by a street car at a street intersection, was guilty of contributory negligence, as a matter of law, when it can be demonstrated that, had he looked with due care after his view was unobstructed as he testified he did without seeing any car, he would have seen the approaching car in time to have easily avoided the collision.

SAME (23) — COLLISION AT CROSSING — PROXIMATE CAUSE — LAST CLEAR CHANCE. The doctrine of last clear chance does not apply where a collision between a street car and an automobile at a street intersection was caused by the contributory negligence of the driver of the automobile, and there was nothing to reasonably indicate to the motorman any purpose or lack of ability to handle the automobile with due care until after it was too late to avoid the collision.

DEATH (9)—RIGHT OF ACTION—DEFENSES—CONTRIBUTORY NEGLIGENCE. In an action for wrongful death, the contributory negligence of the husband, resulting in the death of the wife, is the contributory negligence of the community and hence precludes recovery for wrongful death of the wife.

Appeal from a judgment of the superior court for King county, Frater, J., entered April 21, 1919, upon granting a nonsuit, dismissing an action in tort. Affirmed.

Milo J. Loveless, for appellant.

James B. Howe and *A. J. Falknor,* for respondents.

MITCHELL, J.—This is an action by Fred H. Heath, as administrator of the estate of Agnes Winifred Heath, deceased, to recover damages sustained by himself, the surviving husband, and Frank Harvey Heath, the surviving minor son, because of the death

[1]Reported in 186 Pac. 313.

of Mrs. Heath. It arose out of a collision between an automobile driven by Mr. Heath and a street car in charge of Wylie, as motorman, belonging to the Puget Sound Traction, Light & Power Company, at a street crossing in Seattle. There were charges of negligence and a counter charge of contributory negligence. At the close of plaintiff's case, in a trial to a jury, a judgment of nonsuit was granted, from which the appeal is prosecuted.

On July 15, 1918, at 6:10 p. m., Mr. Heath, sitting on the left-hand side, on the front seat, his wife and son on the rear seat, was driving his automobile, top down, eastward on East 47th street, which crosses at right angles 14th avenue northeast, upon which was operated a double-track railway, the west track for street cars going south. The collision occurred with a street car coming from Mr. Heath's left, that is, traveling south on the west track. It resulted in the death of Mrs. Heath. Mr. Heath had lived in the vicinity some time and was familiar with the scene. The streets were paved and the weather was fair. There was no other traffic near by to disturb. Immediately at the northwest corner of the two streets there was located what is called the Wilson building, immediately east of which was a paved sidewalk nine feet wide to the curb, thence street, thirteen and one-half feet to the nearer rail of the west car track. On the curb, running to the north, there was a string of ordinary telephone poles. North of the street intersections, 14th avenue is straight and practically level for more than seven hundred feet. The next street crossing 14th avenue northeast to the north is East 50th street, which is about six hundred and thirty or six hundred and thirty-five feet north of the north side of East 47th street. Mr. Heath estimated the

speed of the street car at thirty-five miles, while other of his witnesses placed it as high as forty miles. Concerning the speed of his automobile, he said it was not going over five miles an hour, although he admitted that, in a report to the police department, and in his testimony at the inquest, he had stated he was going at a greater speed. At one time he testified that, when he got far enough along into 14th Avenue Northeast and by the corner of the Wilson building, he could, and did, see, notwithstanding the telephone poles, two hundred and fifty to three hundred feet northward on that avenue; and, at another time, he testified that, from that point, he could see northward one-half the distance of six hundred and thirty or six hundred and thirty-five feet to East 50th street. At one time he testified that, after the look to the north, he then looked to the south towards a street car approaching from that direction several blocks away, then looked in front, and never saw the street car coming from the north until it was within forty or fifty feet of him. At another time, by question and answer, he testified as follows:

"Q. From the time that you got by so that you could look by Mrs. Wilson's building until you got on to the track immediately in front of the street car, you didn't look to the north to see if a street car was coming, did you? A. I looked until I was almost on the track."

He also said:

"When I realized the car was coming and I was directly in front of it, and saw it, the street car was about the length of one street car, or between forty and fifty feet away from me."

He further testified that, from the corner of the Wilson building, where he looked to the north for a street car, until the automobile got on the track where

he first saw the street car, his automobile went eighteen or nineteen feet. This statement is corroborated by other testimony of his and the location of the street car track. Wherever there is any difference in the opinions, estimates and testimony of the witnesses, those given by Mr. Heath himself are the most favorable to him, except as to the speed of the street car, which one of his witnesses placed at forty miles. As to the distance at which a street car to the north could be readily seen from the corner of the Wilson building, a photograph in evidence shows a good view for that purpose twice the distance testified to by appellant. However, the rule is that the evidence must be construed most favorably to the plaintiff, upon a motion for a nonsuit. Tested by that rule, we have a situation here in which the appellant claims he looked to a point three hundred feet distant and saw no street car, but that, from some point beyond that, a street car came at forty miles an hour and reached a point fifty feet from that at which the collision occurred, while his automobile, traveling five miles an hour, covered eighteen or nineteen feet. That is, while he traveled nineteen feet, the street car, coming eight times as fast, traveled more than two hundred and fifty feet, instead of only one hundred and fifty-two feet. It is clear he did not look with the care demanded by the law and in such way as to exempt him from the charge of contributory negligence. *Herrett v. Puget Sound Tr., L. & P. Co.,* 103 Wash. 101, 173 Pac. 1024; *O'Reilly v. Davis,* 136 App. Div. 386, 120 N. Y. Supp. 883.

Appellant invokes the doctrine of last clear chance. There is no merit in the claim. The street was unobstructed, and appellant, who could plainly see, was using a light automobile which he said could be stopped within three feet. From the evidence, there

was nothing to reasonably indicate to the motorman on the street car any purpose or lack of ability on the part of appellant inconsistent with the duty or intention of managing his light, easily handled automobile in the ordinary careful manner, until it was too late for the motorman to avoid the collision.

Lastly, appellant urges that, as administrator, he should recover for the benefit of the minor son, notwithstanding any contributory negligence of Mr. Heath. On the authority of the case of *Ostheller v. Spokane & Inland Empire R. Co.*, 107 Wash. 678, 182 Pac. 630, this point must be resolved against the appellant.

Judgment affirmed.

HOLCOMB, C. J., MACKINTOSH, MAIN, and PARKER, JJ., concur.

[No. 15490. Department Two. December 16, 1919.]

J. E. CHILBERG, *Appellant*, v. W. H. PARSONS, *Respondent*.[1]

APPEAL (151½)—EXCEPTIONS—TIME AND MANNER OF TAKING. Under Rem. Code, § 339, providing that exceptions to instructions may be taken any time before the hearing of the motion for a new trial, oral exceptions taken immediately on the jury's retiring and embodied in the record by the stenographer will be considered on appeal.

MUNICIPAL CORPORATIONS (379, 392)—USE OF STREETS—NEGLIGENCE—CROSSINGS—VIOLATION OF ORDINANCE—INSTRUCTIONS. It is error to refuse a requested instruction to the effect that a violation of an ordinance giving the right of way at intersections to the automobile on the right would be negligence as a matter of law; nor is the error cured by a negative instruction on the subject stating that such right of way was not absolute and tending to lead the jury to disregard its terms.

SAME (388) — NEGLIGENT DRIVING — EVIDENCE — ADMISSIBILITY. Upon an issue as to the negligence of the driver of an automobile

[1]Reported in 186 Pac. 272.

upon the occasion of its collision with another, it is not competent to show that he was habitually careless or accustomed to drive at excessive speed.

Appeal from a judgment of the superior court for King county, Allen, J., entered February 26, 1919, upon the verdict of a jury, rendered in favor of the defendant, in an action for damages sustained through an automobile collision. Reversed.

Ballinger, Battle, Hulbert & Shorts, for appellant.

Kerr & McCord and *Stephen V. Carey,* for respondent.

TOLMAN, J.—This is an appeal from a judgment in favor of respondent, defendant below, based upon a collision between a Pierce-Arrow automobile driven by appellant's son, and a Locomobile driven by respondent's chauffeur. The collision occurred at the intersection of Thirtieth avenue and East Alder street, in the city of Seattle, each of which streets is sixty feet wide between property lines, and has a twenty-four foot paved roadway between the curb lines. At the time in question, appellant's car was being driven in a westerly direction along East Alder street, and respondent's car was being driven northerly along Thirtieth avenue. The cars collided near the northwest corner of the intersection of the two streets, and both cars were severely damaged.

Appellant alleged in his complaint that respondent's driver was negligent in the following particulars:

(a) Traveling at an excessive rate of speed.

(b) Failing to concede the right of way at the intersection to appellant's car.

(c) Driving near the middle of the street instead of near the right-hand curb, and

(d) Failing to keep a proper lookout.

Respondent denied all negligence and affirmatively pleaded contributory negligence, and counterclaimed for damages to his own car, alleging negligence on the part of appellant in the following particulars:

(a) Failure to use reasonable care after the possibility of collision became apparent.

(b) Running at an excessive rate of speed.

(c) Driving near the middle of the street instead of near the right-hand curb, and

(d) Negligence on the part of appellant in permitting his car to be driven by his son, who was charged to be an incompetent driver and habitually negligent in his operation of such vehicles.

Appellant introduced evidence tending to support his allegations. Respondent's motion for nonsuit at the close of appellant's case was denied. Respondent introduced evidence to support the issues tendered by him. The jury by its verdict denied damages to either party.

Appellant assigns as error herein the giving and refusing to give certain instructions to the jury, and the admission of certain testimony offered for the purpose of proving that appellant's son was a negligent and incompetent driver. Respondent contends that the errors, if any, in the giving and refusing of instructions have been waived by want of proper exceptions. The record shows that, immediately upon the retiring of the jury, counsel for appellant attempted to take exceptions orally to the refusal of the court to give the requested instruction upon which he chiefly relies, and particularly called the court's attention at that time to such requested instruction. Thereafter, and before the argument on the motion for a new trial, proper and complete written exceptions were filed with the clerk, but there is nothing in the record to show that such written exceptions were

called to the attention of the trial court before the disposal of the motion for a new trial. In *Coffey v. Seattle Elec. Co.*, 59 Wash. 686, 109 Pac. 202, speaking upon this subject, it was said:

"Laws 1909, page 184, ch. 86, Rem. & Bal. Code, § 339, amended Bal. Code, § 4993, by providing that the charge of the court should be in writing and given to the jury prior to the argument of counsel; the jury then being permitted to take the written instructions with them into the jury room. The last sentence of this 1909 act reads as follows:

" 'Either party, at any time before the hearing of a motion for a new trial, may except to the instructions given by the court, or any part thereof.'

"This act, neither by its express terms nor by its language, attempts to change the method of taking such exceptions, its only reference to exceptions being as to the time in which they may be taken; whereas, under the old procedure they should be taken before the return of the verdict, it is now proper to take them at any time before the hearing of a motion for a new trial, giving the trial judge the opportunity to correct any error it may have made in its instructions in its ruling upon the motion for a new trial, and thus, as under the old procedure, save the necessity for review by appeal. The manner of taking exceptions in this particular being in no wise referred to in the amendment of 1909, we must look to the old procedure for the correct method. They must still be taken by stating the same to the trial judge, and by him noted in the minutes of the court or embodied in the record of the cause by the stenographer taking such record."

This case has been followed and approved in a long line of decisions of this court, not necessary to be here cited. Since the statute, Rem. Code, § 339, does not require the exceptions to be in writing, and since the exceptions may be taken "at any time before the hearing of a motion for a new trial," and since the oral exception here taken was "embodied in the record

of the case by the stenographer taking such record," we conclude that we may properly consider appellant's exception, so far as so embodied. The instruction which was requested by appellant, refused by the trial court, and to which refusal appellant so excepted and directed the attention of the court, was to the effect that § 49 of ordinance No. 37,434 of the city of Seattle, which was in effect at the time of the accident, provides:

"Drivers shall look out for and give the right of way to vehicles simultaneously approaching the street intersection from their right"

and as the direction in which each party's automobile was proceeding was an undisputed fact in the case, it was the duty of respondent's driver to look out for and give the right of way to appellant's car, if they were simultaneously approaching the intersection where the accident occurred, because appellant's car was on the right of respondent's car, and to violate the provisions of the ordinance was of itself negligence, and if the jury believe from the preponderance of the evidence that respondent's driver did so violate the ordinance, and such violation was the proximate cause of the injury to appellant's car, then their verdict must be for the appellant. We do not find any instruction given which in substance covers the matter here involved, or which directly advised the jury as to the right of way fixed by ordinance. The nearest approach to such an instruction is the following, which was given:

"Notwithstanding the fact that cars approaching from the right under the traffic ordinance have the right of way at the intersection, as against another car simultaneously approaching from the left, that right of way is not absolute and does not absolve the driver of the car on the right from the obligation to

use reasonable care and caution to avoid a collision at the intersection. If the driver of the car on the right fails to use reasonable care and caution, as a result of which omission a collision occurs, there can be no recovery as against the owner of the other car."

This instruction does not directly and positively call attention to the traffic ordinance, but so far treats that ordinance negatively as might tend to lead the jurors, with nothing else before them, to disregard its terms; but if the requested instruction had first been given, the quoted instruction could have been given immediately following, and so given, it would have explained the meaning of the term "right of way," so that the jury could have correctly applied the ordinance to the facts in the case; especially so in the light of the further instruction which was given, to the effect that the jury should not single out any one instruction, but should apply them as a whole. We are clear that the requested instruction referred to should, in substance, have been given.

The assignment of error predicated upon the admission of testimony is directed at the testimony of a motorcycle policeman of the city of Seattle, produced on behalf of the respondent, who was asked:

"Have you had occasion to observe the rate of speed at which Mr. Chilberg (the son) has been accustomed to drive his car?"

To which the appellant's counsel entered the objection:

"I object to all this line of testimony for the reason that it is wholly irrelevant, incompetent and immaterial, unless it is confined to the occasion in question;"

The Court:

"They allege that as a defense. One of their paragraphs of the answer is an allegation of the incom-

petence of the driver because of the fact that he is alleged to be a dangerous driver . . . While it is true that the man who is ordinarily a careless driver might on this particular occasion have been driving in a lawful manner, and it is true that a man who is ordinarily a very careful driver might have driven in an unlawful manner, still I think the matter can go to the jury, along with all the other evidence in the case, as to whether or not, under the particular circumstances, he was driving this car in a proper manner. Overruled."

and following such ruling, the witness was permitted to testify at length along the line indicated. In *Carter v. Seattle*, 19 Wash. 597, 53 Pac. 1102, this court said:

"The general and well settled rule in negligence cases is that it is not proper for a plaintiff, in order to rebut evidence of particular acts of negligence, to show that he is generally careful, cautious and prudent; nor can it be shown that a party is habitually careless to support a claim of negligence upon a particular occasion. The principle underlying these cases and the case at bar is that such evidence raises a collateral issue not affecting the question to be determined. *Fahey v. Crotty*, 63 Mich. 383 (29 N. Y. 876, 6 Am. St. Rep. 305); *City of Junction City v. Blades*, 1 Kan. App. 85 (41 Pac. 677); *Adams v. Chicago, M. & St. P. Ry. Co.*, 93 Iowa 565 (61 N. W. 1059); *Illinois Central R. R. Co. v. Borders*, 61 Ill. App. 55; *Wooster v. Broadway & S. A. R. R. Co.*, 72 Hun 197 (25 N. Y. Supp. 378)."

The same rule is also approved in *Kangley v. Rogers*, 85 Wash. 250, 147 Pac. 898; and being satisfied that this is a salutary rule tending to promote justice, and that any departure therefrom would invite the trial of cases on collateral issues, we now adhere to our previous ruling.

The respondent contends that, in any event, appellant made out no case sufficient to go to the jury, and his motion for nonsuit should have been granted. We

have followed his argument in this respect, examined the evidence with some degree of care in the light of that argument, and after so doing, we cannot hold that there were no facts, or reasonable inferences to be drawn therefrom, upon which the minds of reasonable men might not differ, and, as we read the evidence, the case does not fall within the rule laid down in *Herrett v. Puget Sound Tr., L. & P. Co.*, 103 Wash. 101, 173 Pac. 1024.

Because of the errors pointed out, the judgment is reversed, and the cause is remanded for a new trial.

HOLCOMB, C. J., FULLERTON, BRIDGES, and MOUNT, JJ., concur.

[No. 15546. Department Two. December 16, 1919.]

GEORGE WEIKEL *et al., Appellants,* v. SYRENUS A. DAVIS *et al., Respondents.*[1]

MORTGAGES (7)—DEBTS SECURED—LIEN WITHOUT PERSONAL OBLIGATION. A mortgage may be given to secure a lien upon real estate without any accompanying debt or personal obligation to pay, in view of Rem. Code, § 1117, which provides that, if there is no such agreement, the remedy shall be confined to the property.

CONTRACTS (22)—MORTGAGES (12-1)—CONSIDERATION. The withdrawal and relinquishment of conflicting claims to coal lands applied for under the land laws, is a sufficient consideration for an agreement to pay certain sums therefor, and for a mortgage on the lands after patent issued.

CONTRACTS (40, 41)—MINES AND MINERALS (3½)—PUBLIC POLICY—RESTRICTION ON CONVEYANCES. The only restriction upon the acquisition of Federal coal lands being the limitation that no one person shall obtain more than 160 acres and no association more than 320 acres, a contract for a relinquishment whereby the patentee agrees to mortgage the land acquired to secure the sum agreed upon as consideration for the relinquishment is not in violation of the act or against public policy.

[1]Reported in 186 Pac. 323.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered May 27, 1919, in favor of the defendants, dismissing an action to foreclose a mortgage, tried to the court. Reversed.

Parker, La Berge & Parker and *Gordon & Easterday,* for appellants.

A. E. Rice and *Hartman & Hartman,* for respondents.

BRIDGES, J. — This was a suit to foreclose a real estate mortgage. Long prior to the government survey thereof, the parties hereto entered upon and improved certain coal lands located in Lewis county, Washington. When the survey was made, the parties offered their filings. It was then discovered that the claims and filings of appellants seriously conflicted with those of respondents. The appellants made individual claims and filings, but respondents claimed and filed collectively and as an association, thereby, under the coal land laws, being entitled to 320 acres. When the United States land office at Vancouver, Washington, learned of the conflicting claims and filings, it fixed a time and place for hearing to determine the preference rights of the parties. Before any testimony was taken, a conference between the claimants resulted in the drawing up and execution of a written instrument, dated December 9, 1907, between all of the appellants on one side and all the respondents on the other side. This agreement especially recognized the conflict of claims and recited that it was entered into for the purpose of avoiding the uncertainties of litigation. By its terms the appellants, for the consideration hereinafter named, agreed to withdraw all of their claims to the lands, to relinquish their rights to the United States government, and do whatever they could,

in good faith, to assist the respondents, or their predecessors in interest, to obtain patent from the government. The agreed consideration to be received by the appellants was the sum of one thousand dollars, payable in cash; $600 of which was paid to the appellant Weikel, $200 to the appellant Albert A. Dennis, and $200 to the appellant Arthur U. Dennis. It was further provided that the appellants were to receive the further sum of $26,000, of which Weikel should receive $19,400, Albert A. Dennis $2,200, and Arthur U. Dennis $4,400. The contract further provided that, within twenty days after the issuance of the government patent, the respondents, or their successors in interest, should execute and deliver to appellants a first lien upon the lands so received by them, for the purpose of securing the payment of the aforesaid $26,000 and the accrued interest thereon, and that such instrument should distinctly state that the respondents should not be personally liable for the payment of the said moneys, or any part thereof, but that the property itself was to be pledged and held solely liable for the payment of the debt, and that, if the indebtedness was not paid on or before three years, or if certain interest and taxes were not promptly paid, the mortgage lien might be foreclosed. This instrument was duly filed for record in the office of the auditor of Lewis county on December 17, 1914.

Thereafter the appellants executed their release to the government, and still later the government issued patent to the respondents covering 320 acres of the land in dispute. Thereafter, and on March 27, 1917, respondents or their successors in interest, pursuant to their contract, made their mortgage to the appellants, which mortgage covered all of the lands to which respondents had received title from the government.

This mortgage was given to secure the payment of $27,000, as follows: To George Weikel, $20,145.93; to Albert U. Dennis, $4,569.33; and Arthur A. Dennis $2,284.74. The mortgage further provided that the mortgagors should pay all taxes before the same became delinquent, and should pay a certain interest on January 1, 1918. It was further provided that there should be no deficiency judgment against any of the mortgagors, but that the mortgagees must look exclusively to the land for reimbursement. In other respects the mortgage was in usual form. This mortgage was filed for record in the auditor's office of Lewis county on April 30, 1917. The mortgagors being in default, the appellants, as mortgagees, brought suit to foreclose their mortgage. The trial court refused to foreclose the mortgage and entered judgment dismissing the action. This appeal is from that judgment.

Section 2347 *et seq.*, of the United States Revised Statutes, regulate the entry and acquiring of coal lands. They provide that any person above the age of 21 years, who is a citizen, or any association of persons severally qualified, shall have the right to enter a quantity of vacant coal lands of the United States, not exceeding 160 acres to such individual person or 320 acres to such association; also that there shall be only one entry by the same person or association of persons, and no association of persons, any member of which shall have taken the benefits of the acts allowing entry either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof.

It is first contended by the respondents that the instrument of March 27, 1917, being the mortgage sought to be foreclosed, is, in fact and in law, not a mortgage, because there was no debt and because the

mortgagors at no time became personally liable. This position is untenable. It is not necessary that there should be a personal liability of the mortgagor in order for there to be a mortgage. It is a common practice in the state of Washington for mortgages to be drawn which specially provide that the mortgagee shall look exclusively to the mortgaged lands and that there shall be no personal liability of the mortgagor, and, so far as we are aware, it has never before been questioned that such instruments were mortgages. Our statutes recognize such mortgages. Section 1117, Rem. Code, provides that, "when there is no express agreement in the mortgage, nor any separate instrument given for the payment of the sum secured thereby, the remedy of the mortgagee shall be confined to the property mortgaged."

The law on this subject is plainly stated in the case of *Pioneer Gold Min. Co. v. Baker,* 23 Fed. 258, where it is said:

"A mortgage may be created as well without as with an accompanying personal obligation of the mortgagor to pay the debt secured, or attempted to be secured, thereby. In the one case the property alone is charged with the lien—is looked to solely by the mortgagee out of which to make his lien; in the other, he has the additional security of the personal obligation of the mortgagor. A debt chargeable only against certain property is, in effect, simply a debt with limited means of satisfaction or enforcement; the value of the property charged with the indebtedness is the measure of the security afforded."

To the same effect, see the following authorities: 19 R. C. L. 296; *Graham v. Stevens,* 34 Vt. 166, 80 Am. Dec. 675; *Campbell v. Dearborn,* 109 Mass. 130, 12 Am. Rep. 671; *Wing v. Cooper,* 37 Vt. 169; *Fisk v. Stewart,* 24 Minn. 97.

It is further contended by the respondents that the withdrawal by appellants of their claims to the lands in question and the relinquishment by them to the government is an insufficient consideration for either the original contract or the mortgage. We cannot agree with this contention. This court has held to the contrary. *Harris v. Johnson,* 75 Wash. 291, 134 Pac. 1048; *Waring v. Loomis,* 35 Wash. 85, 76 Pac. 510. The appellants released, and respondents received, valuable rights, and this was a valid and sufficient consideration.

The respondents further contend that the original contract and the mortgage are void because the same are in violation of the Federal coal lands act and against public policy. Practically the only limitation provided by the coal land act is that one person shall not obtain more than 160 acres, and an association of persons shall not obtain more than 320 acres. The Federal act with reference to acquiring homesteads provides that lands acquired under that act shall not become liable for the satisfaction of any debt contracted prior to the issuance of patent, and that the person acquiring the homestead must make affidavit that he is acquiring it for his personal use and benefit and not for the use and benefit of any other person, and has not made any contract for the conveyance thereof to any other person. It will be noticed that the coal land act does not contain any of these limitations and restrictions. Section 2289 *et seq.,* Revised Statutes of United States. In the case of *Ireland v. Henkle,* 179 Fed. 993, the court, in speaking of the coal land act, said:

"I fail to find anything in the statute which precludes an entryman who has perfected his entry from selling it or giving it away to whom he pleases, or which precludes any individual or corporation from

buying up as many entries actually made by others as he or it pleases. Nor does there seem to be anything in them which makes the present frame of mind of any person making entry of any importance. . . . Nor is there anything in the statute which forbids any one from promising to buy such individual entries, or the entryman from relying on such promise."

The supreme court of the United States, in the case of *United States v. Colorado Anthracite Co.*, 225 U. S. 219, in discussing coal land entry, held that:

". . . in the absence of evasions of restrictions as to quantity, there is no prohibition, express or implied, against an entry by a qualified person for the benefit of another person fully qualified to make the entry in his, or, if a corporation, in its, own name." [Syllabus.]

But it is contended by the respondents that the instrument sought to be foreclosed is, in fact, not a mortgage at all, but is in reality an agreement conceived in fraud, whereby respondents are to acquire these lands for the appellants, thus giving them more land than they could lawfully acquire under the coal land act; that the whole business was a conspiracy and fraud to defeat the government. This contention might be serious if the facts substantiated it, but there is nothing in the record to indicate that there was any such conspiracy or fraud; on the contrary, it shows that all of the parties were acting in the utmost good faith; that the appellants were waiving, in favor of the respondents, their rights to acquire what were then supposed to be valuable coal lands, and that they were willing to so waive for the consideration to be paid by the respondents. There certainly can be nothing illegal in this transaction, nor is it in any sense in violation of public policy. It has been time and again held under the Federal homestead laws, which, as pointed out, contain many restrictions which

are inapplicable to coal lands, that a mortgage given by one entering a homestead, but before final proof has been made, is a valid instrument. If such a mortgage is not in violation of the homestead act, it certainly will not be held to be in violation of the coal land act. See the following cases: *Weber v. Laidler,* 26 Wash. 144, 66 Pac. 400, 90 Am. St. 726; *Waring v. Loomis,* 35 Wash. 85, 76 Pac. 510; *Stark v. Morgan,* 73 Kan. 453, 85 Pac. 567, 6 L. R. A. (N. S.) 934; *Hafemann v. Gross,* 199 U. S. 342.

Respondents offered some testimony to the effect that some of them executed the mortgage without knowledge of its contents, and that it was procured by fraud. They do not press these points either in their brief or in the oral argument. We have carefully considered the record with reference thereto and do not find any merit therein.

The judgment of the lower court is reversed, and the case remanded with instructions to enter the usual decree of foreclosure in accordance with the provisions of the mortgage.

Holcomb, C. J., Mount, and Tolman, JJ., concur.

[No. 15566. Department Two. December 16, 1919.]

NETTIE MORGAN *et al.*, *Appellants*, v. H. E. CUNNINGHAM *et al.*, *Respondents*.[1]

INFANTS (1)—EMANCIPATION—MARRIAGE. A minor son is emancipated by marriage with the consent of his parents, although it does not remove civil disabilities.

HOMESTEAD (4)—HEAD OF FAMILY—MINOR SON—"MAINTAINED." A widow is not entitled to claim a homestead, as having residing with her a minor son under her care and "maintenance," within Rem. Code, § 553, where the son had been emancipated by his marriage and was himself the head of a family and was contributing to the support of the combined family rather than being maintained by his mother.

Appeal from a judgment of the superior court for Thurston county, Wilson, J., entered April 17, 1919, upon granting a nonsuit, dismissing an action for equitable relief, tried to the court. Affirmed.

Troy & Sturdevant, for appellants.

Thos. M. Vance, for respondents.

BRIDGES, J.—The appellant claims a homestead in a small tract of farm land in Thurston county, Washington, on the ground that she has living with her, and under her care and maintenance, a minor son. On the other hand, the respondent contends that the minor is not maintained by the appellant, and that, therefore, the appellant does not bring herself within the purview of the homestead laws of the state. The trial court held that appellant was not entitled to claim a homestead.

Section 553, Rem. Code, with reference to homesteads, defines "head of the family" as follows:

"The phrase 'head of the family' as used in this chapter includes within its meaning, . . .

[1]Reported in 186 Pac. 309.

"(2) Every person who has residing on the premises with him or her, and under his or her care and maintenance, either,—

"(1) His or her minor child or the minor child of his or her deceased wife or husband. . . ."

It will be noted that, in order that one may be the head of a family because of a minor child, that child must not only be residing with and under his care, but must be maintained by him. Maintenance is one of the necessary conditions.

The facts are substantially as follows: The appellant owns, as her separate property, the small tract of land above mentioned. She and her husband and their family lived on these premises for a number of years prior to the death of her husband, which was on May 3, 1917. She continued thereafter to reside at the same place. Charles W. Morgan is a minor son of the appellant and lived with her and his father prior to the latter's death, and with her most of the time since his father's death and until his marriage. On July 3, 1917, with the consent of his mother, he was married, and thereafter most of the time he and his wife lived at the home of and with the appellant. On October 27, 1917, appellant filed her claim of homestead. A short time previous thereto, the respondent Cunningham had obtained a personal judgment against the appellant. He sought to enforce this judgment, and levied upon and threatened to sell the property claimed as a homestead. Both before and after Mr. Morgan's death, his minor son, Charles, was in the habit of going out to work. He was employed at one place for several weeks, and at another place for several months, and at still a third place for a considerable length of time. When working for wages, as he did most of the time when away from home, he received the usual wages paid to his co-workers. After

his father's death, he secured his own employment, made his own terms, generally without consulting his mother, and collected his own wages. When he was not at work elsewhere, he worked about the home premises. Whether working on his mother's land or elsewhere, he considered his mother's home as his own and that of his wife, but generally, when working away from home, he lived temporarily at the place he was working. When working away from home, he took provisions from his mother's place for the use of himself and his wife. At the time this suit was tried, a child had been born to them. He and his mother kept what they termed a "family pocketbook," and whatever he earned over and above his incidental expenses was generally put into this family pocketbook. They all lived as one family and, as one family, paid the bills, combining their efforts and income to that end.

The courts have almost unanimously held that, where a minor son is married with the consent of his parents, he thereby becomes emancipated. Thereafter he is the head of a family and controls his own time and affairs, and his parents have no right to require his services or to demand any of his earnings. In the case of *Commonwealth v. Graham,* 157 Mass. 73, 31 N. E. 706, 34 Am. St. 255, 16 L. R. A. 578, the court said:

"It seems to be settled that the marriage of a minor son with the consent of his father, works an emancipation. . . . It has been said: 'The husband becomes the head of a new family. His new relations to his wife and children create obligations and duties which require him to be the master of himself, his time, labor, earnings and conduct.' . . . The meaning of emancipation is not that all of the disabilities of infancy are removed, but that the infant is freed

from parental control, and has a right to his own earnings."

To the same effect, see the following cases: *Cochran v. Cochran*, 196 N. Y. 86, 89 N. E. 470, 24 L. R. A. (N. S.) 160; *State ex rel. Scott v. Lowell*, 78 Minn. 166, 80 N. W. 877, 79 Am. St. 358; *Jackson v. Banister*, 47 Tex. Civ. App. 317, 105 S. W. 66; *Holland v. Beard*, 59 Miss. 161, 42 Am. Rep. 360.

Sections 8743 and 8744, Rem. Code, provide that a male shall arrive at lawful age at twenty-one years, and a female at eighteen years, but the marriage of a female under eighteen years to one who is of full age has the effect of making such female of full and lawful age. The statute does not, however, make a male minor of lawful age because of marriage. We therefore agree with the appellants' contention that the marriage of Charles Morgan did not make him of lawful age, nor did it remove the civil disabilities imposed upon him as a minor. See cases above cited. But such marriage did have the effect of emancipating him and making him the head of a family. He thereafter became his own man. He was bound to use his income and wages, not for the support of his mother, but for the support of his own family. It is conceded by counsel on both sides of this case that there are very few decisions which lend much light to this case, because the homestead statutes of the various states are very different from our own. As a rule, the statutes of the other states entitle one who is merely the head of a family, or who has a family living with him, to claim a homestead, and those statutes as a rule do not define, as does our statute, who shall be considered the head of the family. Nor, under most of the state statutes, is it necessary that any person be dependent upon or maintained by the head of the family, as is required by our statute. For these rea-

sons, most of the cases cited by the appellant are not in point. In the case of *Tyson v. Reynolds,* 52 Iowa 431, 3 N. W. 469, the facts were that the widower, who was claiming the homestead, had living with him his son and his son's wife, and the court held that he was the head of a family and entitled to claim a homestead. The court said:

"A family is 'the collective body of persons who live in one house, under one head or manager.' The relation existing between such persons must be of a permanent and domestic character, not abiding together temporarily as strangers. There need not, of necessity, be dependence or obligation growing out of the relation."

It will be noticed that, under the Iowa statute, it was not necessary that the son and his wife should be dependent upon, or maintained by, the homestead claimant.

Homestead statutes, because of their nature and purpose and the result sought to be obtained, should be liberally construed. Consequently, when the statute requires that the minor shall be maintained by the head of the family, it does not mean a complete dependence of the minor; it is sufficient if the child is materially or substantially maintained. But in instances where the child is emancipated and supports its parent more than it is by the parent supported, it cannot be said the parent maintains the child within the purview of our homestead act. So in this case, when all of the facts are taken into consideration, we are forced to the conclusion that Charles Morgan, the minor child, was not maintained by the appellant, but, on the contrary, he voluntarily contributed to her support; that she was maintained by him, rather than he by her. Besides, it would seem to be inconsistent to hold that a minor son, who is himself the head of a

family, may legally be so under the care and maintenance of his mother as thereby to make her the head of a family, as contemplated by our homestead statutes.

We think the judgment should be affirmed. It is so ordered.

HOLCOMB, C. J., TOLMAN, MOUNT, and FULLERTON, JJ., concur.

[No. 15429. Department One. December 17, 1919.]

ALVA BARNHART, *Appellant*, v. JOHNSON BARNHART, *Respondent*.[1]

DIVORCE (8-2)—GROUNDS—FAILURE TO SUPPORT. Where abandonment had existed for more than a year and the husband had failed to support the wife for a length of time which indicated a settled purpose to disregard his duty, it is error to refuse the wife a divorce.

Appeal from a judgment of the superior court for Yakima county, Holden, J., entered April 22, 1919, in favor of the defendant, dismissing an action for divorce. Reversed.

Frank J. Allen, for appellant.

MAIN, J.—The plaintiff brings this action, seeking dissolution of the bonds of matrimony existing between herself and the defendant. The trial court declined to grant the divorce, and entered a judgment dismissing the action. From this judgment, the plaintiff appeals.

The record shows that the parties were married in the month of December, 1915. As a result of this marriage, one child was born, who, at the time of the trial, was approximately two years of age. The evidence shows beyond controversy that the appellant,

[1]Reported in 186 Pac. 267.

without fault on her part, was abandoned by the respondent in May, 1917, and that, subsequent to that time, he had refused to live with her or contribute to her support. He had, however, contributed at times something to the support of the child. The action was brought in September, 1918. It appears that the abandonment had existed for more than a year, and that the respondent had failed to support the appellant for a length of time which indicated a settled purpose on his part to disregard his obligation in this respect. Under the cases of *Garland v. Garland,* 66 Wash. 226, 119 Pac. 386, and *Merriam v. Merriam,* 75 Wash. 389, 134 Pac. 1058, the appellant was entitled to the decree which she sought.

The judgment will be reversed, and the cause remanded with directions to the superior court to enter a judgment for the appellant in accordance with the prayer of her complaint.

Reversed.

HOLCOMB, C. J., PARKER, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 15421. Department Two. December 17, 1919.]

In the Matter of the Application of HARRY GROVES *for a Writ of Habeas Corpus.*

HARRY GROVES, *Appellant*, v. MARY E. BARTO *et al.*, *Respondents.*[1]

DIVORCE (110–113)—FOREIGN DIVORCES—CONCLUSIVENESS—CUSTODY OF CHILD—MODIFICATION. Where a divorce was granted in another state awarding custody of a child to the mother, who acquired a domicile in this state, and the father acquiesced therein, the courts of this state may determine the custody of the child as its welfare may demand in case of changed conditions; and an ex parte modification of the original decree awarding the custody to the father is not binding upon our courts, under the "full faith and credit" clause of the Federal constitution.

SAME (104)—CUSTODY OF CHILD—MODIFICATION OF DECREE. Modification of a decree of divorce to change the custody of a five-year old child from its mother to the father on the ground of unfitness of the mother is properly denied where nothing was shown against her not known at the time of the decree, she had since remarried and has a fit home and is financially able to provide for all its wants.

Appeal from a judgment of the superior court for Whatcom county, Pemberton, J., entered February 3, 1919, upon findings in favor of the defendant, awarding the custody of a child, upon a hearing upon application for habeas corpus. Affirmed.

C. A. Swartz, for appellant.

Fred W. Neal, for respondents.

TOLMAN, J.— The appellant, some time prior to December 21, 1917, brought suit for divorce in the county court of Teller county, Colorado, from his wife, Lena B. Groves, who appeared in that action and filed an answer and cross-complaint. After a hearing or hearings had been had, the defendant therein appeared

[1]Reported in 186 Pac. 300.

in court with her attorney, and in the absence of the plaintiff and his attorney, procured the entry of a decree upon her cross-complaint in her favor, which awarded the custody of the child of the parties to Mary E. Barto, the mother of the defendant, then and now residing in Bellingham, in this state, until the further order of the court. The husband soon learned of the entry of the decree, paid the alimony by it awarded, and knew of the wife's intention to bring the child to Washington for the purpose of placing it in the care of Mrs. Barto, and assisted in that purpose by advancing money for traveling expenses. The decree became final under the Colorado law on June 21, 1918, and thereafter, in December, 1918, after the child and its mother were domiciled in this state, the appellant sought and obtained a modification of the decree in the court where it was entered, by the terms of which the custody of the child was awarded to him. Some notice of this application for modification was served upon the respondents in this state, but neither of them made any appearance in response thereto.

After the child had been in this state about a year, and after the modification of the decree of the Colorado court, as above mentioned, the appellant, armed with such modified decree, came to Washington, personally called upon Mrs. Barto, and demanded possession of the child. The demand being refused, he made application to the trial court for a writ of habeas corpus to secure such possession. Mrs. Barto made answer and return to the writ, and the child's mother, Lena B. Groves (now Lena B. Ridge) appeared, was made a party and defended, without objection. From a decree awarding the child to the mother, this appeal is prosecuted.

It is contended here that, under the rules of comity existing between the courts of the several states, and

the full faith and credit clause of the Federal constitution, the trial court was bound by the modified decree of the Colorado court; and that, in any event, under the evidence introduced, the custody of the child should have been awarded to the father. Cases are not wanting which hold that a decree of divorce awarding the custody of a child or children is not only *res judicata* in the state where entered, but elsewhere, so far as the parties to the original action are concerned, but this rule is not applicable here, because the modification of the decree was based upon substituted service without the state, made after both the mother and child had become domiciled in Washington. The weight of authority is to the effect that, when the child has become domiciled in another state, the courts of the place of domicile may, at the least, determine the custody of such child as its welfare may demand, in all cases where there are shown changes of conditions arising subsequent to the entry of the original decree. *In re Alderman,* 157 N. C. 507, 73 S. E. 126, 39 L. R. A. (N. S.) 988; *Mylius v. Cargill,* 19 N. M. 278, 142 Pac. 918, Ann. Cas. 1916B 941, L. R. A. 1915B 154; Nelson, Divorce and Separation, § 980; 9 R. C. L., § 293.

So here, while appellant claims that the original decree was entered in his absence, and contrary to an understanding that the wife should have a divorce while he should be given the custody of the child (which understanding is denied), yet he had knowledge of the decree before the child and its mother had left the jurisdiction of the court, and if he or the court had been imposed upon, it would seem that it was then his duty to ask that the decree be modified; yet he did nothing looking towards such a modification, permitted and assisted in the child's removal from Colorado and acquiesced for nearly a year, and when he made his application for modification, the in-

terested parties were beyond the jurisdiction of the Colorado court, and the showing upon which the modification was made was an *ex parte* one, of which we have no knowledge, and it should not be binding upon the courts of this state, where the child was domiciled at the time it was made. *Seeley v. Seeley,* 30 App. D. C. 191, 12 Ann. Cas. 1058; *Milner v. Gatlin,* 139 Ga. 109, 76 S. E. 860.

In any event, a change of conditions is set up in Mrs. Barto's return to the writ which was sufficient to justify the trial court in hearing the case on its merits. Going, then, to the merits, we find no little difficulty in determining what are the facts. Everything testified to on the one side is squarely denied upon the other. Appellant attempted to show that both the mother and Mrs. Barto are unfit to have the child. As to the latter, the testimony is not sufficient to warrant any attention, while as to the former, the evidence is confined almost wholly to matters which occurred and were within the knowledge of appellant at and before the time the original decree was entered, and should have been proven, if susceptible of proof, while the Colorado court had jurisdiction of the person of the defendant in that action. The original Colorado decree being silent on all such matters, we are not now disposed to inquire into the conduct of the mother before the entry of that decree. It does appear that the mother has remarried since coming to Washington, has now a fit and comfortable home for the child and is financially able to provide for her wants; and the trial court, who heard and saw the witnesses, was of the opinion that, considering the tender age of the child, now about five years old, its welfare would be best subserved by awarding it to the mother for the time being, and that, if the mother's home and influence should later prove to be what the father feared,

the way would be open under the laws of this state for a subsequent inquiry.

Finding no error, the judgment is affirmed.

HOLCOMB, C. J., BRIDGES, MOUNT, and FULLERTON, JJ., concur.

[No. 15428. Department Two. December 17, 1919.]

In the Matter of the Extension of WEST MARGINAL WAY, SEATTLE.

THE CITY OF SEATTLE, *Respondent*, v. ANNIE ABRAHAMSON, *Appellant*.[1]

HIGHWAYS (7)—ESTABLISHMENT—PRESCRIPTION — DEFECTIVE PROCEEDINGS. Title to a county road was acquired by prescription where the road was ordered and, without being purchased or condemned, was used by the public for thirty years.

SAME (6–8)—EXTENT OF HIGHWAY—WIDTH. Where, at the time a county road was ordered, the law required its width to be sixty feet, title acquired by prescriptive use extends to the full width and is not limited to the ten to fifteen feet actually used by the public.

SAME (3, 6–8). Where title to a sixty-foot county road, ordered but not condemned, was acquired by prescription, the use of a narrow roadway winding around stumps and buildings was not an abandonment of the unused portions; and upon condemnation to increase the width to one hundred feet, a property owner is entitled to compensation only for the additional forty feet, notwithstanding the winding way used touched points on the outer line of the additional strip.

TRIAL (24)—CUMULATIVE EVIDENCE. It is largely discretionary to exclude expert evidence on the ground of want of qualification as an expert, to be disturbed only upon abuse of the discretion.

APPEAL (457, 458)—REVIEW—HARMLESS ERROR. Error in excluding expert evidence is harmless where it would have been accumulative and there was abundant other evidence on the question.

EMINENT DOMAIN (127)—DAMAGES—EVIDENCE—ADMISSIBILITY. In condemnation proceedings in which the sole question is the value

[1]Reported in 186 Pac. 644.

of the property taken, evidence of damages through interference with the care of property while the road was being constructed is inadmissible when it does not appear that such interference would necessarily follow.

Appeal from a judgment of the superior court for King county, Frater, J., entered March 11, 1919, upon the verdict of a jury awarding damages in condemnation proceedings. Affirmed.

Roberts & Skeel (*Lee Johnston* and *L. B. Schwellenbach*, of counsel), for appellant.

Walter F. Meier, Geo. A. Meagher, and *Alex J. Ashen,* for respondent.

MOUNT, J.—This proceeding was brought to condemn a widened right of way for a highway across the lands of appellant. The highway is known as West Marginal Way. This highway is one hundred feet wide and extends through about the center of appellant's property. Preliminary to the question of damages, the trial court, by consent of both parties, received evidence in order to determine the width of the strip of land to be paid for through the property of Mrs. Abrahamson. After hearing evidence upon this question, the trial court found as follows:

"That county road No. 51, as changed and as it is now used through the tracts of land lying south of Goodspeed's Addition, and especially through the tracts of land owned by Annie Abrahamson and by the estate of S. Louise Ackerson, is a county road by prescription and user, and that said county road is sixty feet (60') in width, following the present used portion of said county road as said used portion is indicated and located on petitioner's Exhibit 'B' filed in the above entitled cause; . . ."

After the court had thus determined that there was a county road sixty feet in width running through the property sought to be condemned, and that this

county road was within the limits of West Marginal Way, a jury was called to determine the question of damages to be awarded to Mrs. Abrahamson. After the evidence was heard upon that question, the jury found that the damage to the property of Mrs. Abrahamson was $7,271.50. The court entered a judgment upon this verdict in favor of Mrs. Abrahamson. She has appealed from that judgment.

A large number of errors are assigned in appellant's brief, but these errors are discussed under three headings, in substance, as follows:

First: Was there a public road extending through appellant's property, for the taking of which appellant was not entitled to compensation?

Second: If so, what was the width of that road?

Third: The exclusion of certain evidence offered by appellant.

Taking up these questions in order, the record shows without dispute that, in the year 1874, some fourteen freeholders within the county of King petitioned the county commissioners of that county to establish a county road from Alki Point to connect with a county road on the west side of the Duwamish river near the house of one Parmerlee. The county commissioners, upon a hearing of that petition, granted the same, and viewers were appointed to view and locate the road. The same was ordered surveyed. The road was thereupon viewed and surveyed through the property of appellant, and the surveyor's report was made to the county commissioners. Thereafter, on August 3, 1874, the county commissioners considered the reports of the surveyor and viewers. The reports were adopted and the road was ordered opened and declared to be a county road. Thereafter the road was used by the general public across appellant's land for a period of more than thirty years. The evidence shows that the

portion of the road actually used was from ten to twelve feet in width. This used road was a winding one, following through the property of appellant. There is nothing in the record to show that the county acquired, by condemnation or purchase, the right of way through appellant's property; but the record is clear that, after the road was declared to be a county road and was opened to public travel, it was traveled and used by the public generally, and that work was done upon the road at public expense. It is true that the used portion of the road was shifted upon several occasions and for various purposes. At one time during the life of Mr. Abrahamson, who was then the owner of the property in question, he petitioned the county commissioners for a change of a portion of the road through his property to the eastward of where it was then used. No action appears to have been taken by the county commissioners upon this petition for a change, but it is shown that the used portion of the road was changed and was thereafter used. We are satisfied from these facts that the roadway became a public one, and that, because of the use of the property by the public for the long period of time, and work done thereon at public expense, the right to the roadway was acquired by prescription. *Yakima County v. Conrad,* 26 Wash. 155, 66 Pac. 411; *Olympia v. Lemon,* 93 Wash. 508, 161 Pac. 363.

Appellant argues that, even though there was a roadway by prescription across the land of appellant, it was not within the one hundred feet which the city now seeks to take. It is true the engineer who made the drawing which is an exhibit in the case testified that he could not take the field notes of the original survey of the sixty-foot road and follow them upon the ground. His reason was that the witness trees and marks made by the surveyor upon the ground had

all been obliterated; but he testified that, by following the field notes of the original survey, he could lay the road upon the plat, and he testified therefrom that the whole of the sixty-foot original roadway was within the one hundred feet now sought by the city. It is plain, therefore, that there was evidence upon which the court could base a finding that the sixty-foot roadway was within the one hundred feet which the city was seeking. Appellant strenuously argues that the width of the roadway which was used by the public for more than thirty years was not to exceed ten or twelve feet in width, and that this was the extent of the width of the road to which the county or the city was entitled by prescriptive right; and it is argued, and many authorities are cited to the effect, that a roadway by prescription is confined to the width of the road as actually used, and does not extend to a greater width beyond the width of the road actually used; but in the case of *Olympia v. Lemon, supra,* in considering this question and in referring to the case of *Yakima County v. Conrad, supra,* we said, quoting from the last-named case:

"'After the right to a highway has been acquired by usage, the public are not limited to such width as has actually been used. The right acquired by prescription and use carries with it such width as is reasonably necessary for the public easement of travel, and the width must be determined from a consideration of the facts and circumstances peculiar to the case.'"

In this case the county originally declared for a county road which, under the statute, was required to be sixty feet in width. The county actually laid out and surveyed a road sixty feet in width. We think, under the authorities cited, and the facts, which are not disputed, that the county acquired by prescriptive

right the whole of the sixty-foot road, notwithstanding the fact that but a portion thereof was actually used. Furthermore, we are of the opinion that, when Mr. Abrahamson, who was then alive and was the owner of the property, petitioned the county for a change in the road, he recognized that the county was claiming the road as an actually dedicated road. Appellant relies upon the cases of *Megrath v. Nickerson,* 24 Wash. 235, 64 Pac. 163; and *In re Twenty-Second Avenue, Southwest,* 72 Wash. 99, 129 Pac. 884, to establish the rule that the county road herein sought to be maintained for sixty feet in width across appellant's property never in fact existed. It is true in those cases a portion of the same road outside of the property of appellant in this case was under consideration. In the *Megrath* case, the owners of the property through which the road ran never recognized the right of the county to open the road without taking and paying for their property. Gates were placed on the road, but this court held that the use by the county of the lands there in question was a permissive use, and that the county had no right to take the lands then sought to be taken without compensation and without condemnation. This court, in each of those cases, therefore held that there had been no lawful road across the premises then in dispute. But in this case it is shown that Mr. Abrahamson made no objection to the taking by the county or the public of the roadway across the premises now in question and their using the same for a public way. So that the distinction between this case and the cases relied upon is that, in this case, there was an actual user under claim of right and work done upon the road at county expense by the public; while in the cases referred to, there was no acquiescence by the landowners to the county's acquiring the right by prescription across their premises. We are satisfied,

therefore, that the county acquired a right by prescription across the premises in question to a roadway sixty feet in width.

Appellant argues that the lower court erred in finding that the county road, being a winding road, should be laid sixty feet in width within the proposed one-hundred-foot West Marginal Way, because the prescriptive way acquired by use is but a ten or fifteen foot winding way and at points touches the outer lines of the one-hundred-foot West Marginal Way; that the measurement should be from the center of the used way, so that a part of the sixty-foot strip would lie without the bounds of the one-hundred-foot Marginal Way and a part within. It seems plain that the winding road which was used by the public was used by reason of the original roadway which was established by the county commissioners sixty feet in width. The road which was actually used was from ten to fifteen feet in width. In using this road the use was intended to be of the county roadway. The fact that the used roadway wound around stumps or buildings was not an abandonment of the unused portion, but was a use of the whole roadway established by the county commissioners when it was declared a public way. This roadway was all within the boundaries of the one-hundred-foot right of way, and it seems to us plain that the sixty-foot roadway declared by the commissioners was the one intended to be used; and since that roadway was wholly within the one-hundred-foot right of way, the only part for which appellant was entitled to compensation was the extra forty feet of that road as widened.

A number of errors are alleged by appellant upon the admission of evidence. It is claimed by appellant that the court erred in refusing the evidence of an

expert witness who was called to testify upon the part of respondent in reference to the feasibility of a plan of removing certain buildings that were upon the one-hundred-foot strip to another part of appellant's property. The trial court was of the opinion that this witness was not qualified as an expert upon that question and he was not permitted to testify. In the case of *Kranzusch v. Trustee Co.*, 93 Wash. 629, 161 Pac. 492, we said:

"The qualification of a witness to testify as an expert on a subject requiring peculiar or special knowledge is largely a matter of discretion with the trial court, and its ruling thereon will not be reversed unless there has been a manifest abuse of that discretion."

We are satisfied there was no abuse of that discretion in this case. At most, the testimony which this witness was supposed to give was cumulative. There was abundant other evidence upon this question. We think that, even if it was error to exclude the testimony of this witness, the error was harmless.

Appellant also complains that she was not permitted to prove that the use of the property would be interfered with during the time of construction of the road and she would be damaged on that account. We think there was no error in this. The sole question for the jury was the value of the forty feet of property taken and the damage to that which was not taken. We think it does not necessarily follow in this case that the construction of the widened road through the premises would necessarily interfere with the business to which the other might be put by appellant.

A number of other errors are assigned upon the admission of evidence, but we are satisfied these are not important and that there was no reversible error therein. In our opinion, appellant had a fair trial.

The judgment is therefore affirmed.

HOLCOMB, C. J., BRIDGES, TOLMAN, and FULLERTON, JJ., concur.

[No. 15445. Department One. December 17, 1919.]

ADOLPH LOEWE, *Appellant*, v. OSNER & MEHLHORN, INCORPORATED, *Respondent*.[1]

PLEADING (151)—REPLY—STRIKING AFFIRMATIVE MATTER. Affirmative matter in a reply not constituting a defense to the plea of the statute of limitations is properly struck out.

LIMITATION OF ACTIONS (37) — CONTINUING CONTRACTS — ATTORNEY'S CLAIM FOR SERVICES — DROPPING CASE FROM CALENDAR. The statute of limitations does not run against an attorney's claim for services performed in a case until the termination of the action, and the action is not terminated by merely dropping the cause from the trial calendar upon entering into an agreement for a settlement, where all the matters in controversy were not fully settled.

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 24, 1919, upon granting a nonsuit, dismissing an action on contract. Reversed.

Edgar C. Snyder, for appellant.

Edward Von Tobel, for respondent.

MACKINTOSH, J.—The respondent, in March, 1915, employed the appellant to represent it in two actions pending in the superior court of King county, these being materialmen's actions to foreclose liens against the owners of certain property upon which respondent held a mortgage. Involved in the actions were ten or twelve separate liens. To some of these lien claims, the appellant filed answers, and demurred to one. The two actions were consolidated and set for trial June 7,

[1]Reported in 186 Pac. 643.

1915, and continued from that date until June 21, 1915, when, after consultation between the attorneys and clients, it was determined that the action should not be tried but settled, and the record shows that the action was that day stricken from the calendar. No order of dismissal was taken in the action until May 7, 1918, on which day attorneys for the owners of the property obtained an order of dismissal on an *ex parte* application, supported by an affidavit that, "prior to the trial of the cause, the liens were paid . . . that the liens have all been satisfied with the exception of the lien of plaintiff C. F. Doyle . . . that affiant believes the satisfaction of this lien and the dismissal of the cause is purely an oversight."

The appellant, on July 24, 1918, served the complaint in this action, in which he is asking to recover the sum of $500 as the reasonable value of the services which he rendered in the lien foreclosure case. To this complaint, the respondent answered, setting up as an affirmative defense that the appellant had furnished no service in connection with the lien case since the 21st day of June, 1915, and that his cause of action had therefore not accrued within three years before the commencement of the present suit. The appellant replied, denying the defendant's affirmative matter, pleading facts which he alleged constituted an estoppel to the plea of the statute of limitations. This affirmative matter in the reply was stricken by the trial court, which constitutes one of these errors here alleged. The case went to trial, and upon the trial the court refused to admit certain exhibits offered by the appellant in substantiation of the affirmative matter contained in his reply, and the court, at the end of the testimony, took the case from the jury and granted the defendant's motion for a judgment of nonsuit.

The trial court was correct in striking the affirmative matter in the reply, as it did not constitute a defense to the plea of the statute of limitations, and was also correct in refusing admission of the exhibits offered in evidence; but was in error in nonsuiting the appellant.

An attorney, when he has been employed in legal proceedings, is not barred by the statute of limitations for the recovery of the value of his services which he has rendered until the statutory period has run, dated from the time when the action or proceeding has terminated or the contract of retainer has been otherwise ended. In this case there is no claim that the employment was ended in any other way than by the termination of the action in which appellant was employed, and it is the respondent's claim that this action was terminated on the 21st day of June, 1915. As we view the record, that claim is unfounded. The record discloses that the case was merely dropped from the calendar on June 21, and, although subsequently to that time appellant may not have performed any service in the action, his claim is not barred by that fact alone. It is not contended that the lien claims were all paid on June 21, and, as a matter of fact, the affidavit upon which the case was finally dismissed in May, 1918, shows that, at that time, one lien claim had not been satisfied. If the matter were still open after June 21, 1915, by lien claims being still unpaid, it cannot be said that the action was then terminated, and it is unnecessary to go to the extent of holding that the entire action was undisposed of until a final dismissal, which, according to the *ex parte* affidavit, had not been obtained through oversight. After the case was stricken from the calendar, it was still pending until such time as it was either formally dismissed or the parties interested were entitled to a dismissal

by the settlement of all the matters in controversy, and we cannot say, on the record, that this was more than three years prior to the instituting of appellant's present action. It cannot be held, as a matter of law, that the statute had run against the appellant's claim for attorney's fees so long as anything remained to be done before the final disposition of the case that he was handling for his client.

For the reasons stated, the judgment is reversed and the cause remanded for a new trial.

HOLCOMB, C. J., MITCHELL, MAIN, and PARKER, JJ., concur.

[No. 15582. Department One. December 17, 1919.]

In the Matter of the Estate of ANDERS NILSON.[1]

EXECUTORS AND ADMINISTRATORS (169)—DECREE—CONCLUSIVENESS—WIDOW'S IGNORANCE OF RIGHTS. Under Laws of 1917, p. 689, § 163, providing that a decree of final distribution shall be final and conclusive as to all the world, a widow is not entitled to have a decree set aside to enable her to make a claim for a homestead, on the ground that she was ignorant of English and of her rights, in the absence of a showing of fraud or grounds for the vacation of a judgment as required by Rem. Code, §§ 464-473.

Appeal from an order of the superior court for Kitsap county, Ronald, J., entered April 2, 1919, denying the vacation of a final decree of settlement and distribution, after a hearing upon objections to the petition. Affirmed.

Herbert E. Snook, for appellant.

James Kiefer, for respondents.

MAIN, J.—This is an appeal from an order of the superior court dismissing a petition to vacate the final

[1]Reported in 186 Pac. 268.

decree of settlement and distribution in the estate of Anders Nilson, deceased. The petitioner was the widow of the deceased. Anders Nilson died intestate on March 19, 1917, leaving surviving him the petitioner and a number of children by a former marriage, all adults. The widow petitioned the superior court that one C. O. Qualheim be appointed administrator of the estate, and the heirs approved the petition. Qualheim was appointed administrator, qualified, and proceeded in a regular way to administer the trust. On July 20, 1918, a decree was entered approving the administrator's final account and distributing the estate. On the 19th day of November, 1918, Mrs. Nilson, the widow, petitioned the probate court to vacate and set aside the decree of settlement and distribution. This petition was answered by the other parties interested in the estate. When the cause was called for trial, the heirs objected to the matter proceeding, because they contended that the petition showed no facts which would justify the court in vacating and setting aside the decree of distribution. The court sustained this position and entered an order dismissing the petition. From this order, the petitioner, Mrs. Nilson, appeals.

There is no charge in the petition of fraud, wrongdoing, or overreaching. The purpose of the petition was to have a vacation of the decree of distribution in order that the petitioner might make a claim that a homestead be set apart to her out of the community real property. She alleges, as a reason for not making the claim prior to the distribution of the estate, her unfamiliarity with the English language and ignorance of her rights.

In § 163 of the probate code (Laws of 1917, ch. 156, p. 689), it is provided that the decree of final settlement and distribution entered in an estate matter "shall be final and conclusive as to all the world."

In *In re Doane's Estate*, 64 Wash. 303, 116 Pac. 847, under a prior statute which was less comprehensive in its terms than is the language of the probate code above quoted, it was held that a decree settling the final account of an executor or administrator, when regularly entered, has all the force, effect and finality of any other final judgment rendered by a superior court. Before a judgment vacating a decree can be entered, it is necessary that a showing be made which satisfies the statute covering the matter of the vacation of judgments (Rem. Code, Title III, ch. 17, §§ 464-473). The showing in this case does not meet the requirements of the statute.

The judgment will be affirmed.

HOLCOMB, C. J., MACKINTOSH, PARKER, and MITCHELL, JJ., concur.

[No. 15583. Department One. December 17, 1919.]

H. J. HULL *et al., as H. J. Hull & Company, Respondents,* v. CRESCENT MANUFACTURING COMPANY, *Appellant.*[1]

MUNICIPAL CORPORATIONS (379) — USE OF STREETS — CROSSINGS — RIGHT OF WAY—ORDINANCES. An ordinance giving right of way to cars to the right where automobiles simultaneously approach a street intersection, has no application where the car to the left reached the crossing an appreciable length of time in advance of the other, in which case it has the right of way.

JUDGMENT (13)—ENTRY AND FORM—SUFFICIENCY. A judgment ordering defendant to pay a certain sum with costs is not error, as it is to be tested by its substance rather than its form.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 3, 1919, upon findings in favor of the plaintiffs, in an action for damages sustained in an automobile collision. Affirmed.

[1]Reported in 186 Pac. 322.

William U. Park and *Paul S. Dubuar,* for appellant.
Lee Johnston, for respondents.

MITCHELL, J.—This action arose out of a collision between an automobile and a motor truck. Each party charged the other with negligence, which in turn was denied. Plaintiffs alleged the damages to their automobile were $221.23. The case was tried to the court without a jury. The court found that defendant was negligent and that plaintiffs had been damaged thereby in the sum of $175, and entered judgment in that amount against defendant, from which judgment the appeal has been taken.

The facts are somewhat in dispute, but a consideration of all the evidence satisfies us, as it did the trial court, that appellant was negligent and respondents were not.

The collision occurred in daylight, within the intersection of Spring street and First avenue, in the city of Seattle. These streets cross each other at right angles. Spring street is forty-two feet between curbs, and First Avenue is fifty-two feet between curbs. Respondents' automobile, going west along the north side of Spring street, entered the intersection of the two streets an appreciable length of time before appellant's motor truck. The automobile was going five or six miles an hour, and, continuing its westerly course, had reached a point near the center of First avenue, when, just about the time its driver had commenced to turn towards the south, the motor truck, running northerly at a speed of approximately twenty miles an hour, crashed into the automobile, striking it on the left-hand side near the rear, causing the damages complained of. An ordinance of the city provides that: "Drivers shall look out for and give right of way to vehicles simultaneously approaching

the street intersection from the right." As already stated, respondents' automobile was upon the intersection first and, therefore, had the right of way. The case is very similar to, and is controlled by the rule announced in, the case of *Yuill v. Berryman,* 94 Wash. 458, 162 Pac. 513, as follows:

"The respondent, having entered the intersection of these streets first, was clearly entitled to the right of way. It was the duty, therefore, of the appellant to have stopped his car, or so slackened his speed that there would have been no collision."

The rule was restated and followed in the case of *Jahn & Co. v. Paynter,* 99 Wash. 614, 170 Pac. 132.

Complaint is made concerning the amount of recovery allowed respondents. It is within the proof.

Objection is also made to the form of the judgment, in that it provides: "It is hereby ordered and adjudged that defendant pay to plaintiffs the sum of $175, together with plaintiffs' statutory costs taxed herein," rather than simply providing that plaintiffs have judgment against defendant in the sum of $175 and costs. It is plain that the instrument is a final adjudication of the cause upon the merits and not a mandate or determination upon some subsidiary or collateral matter arising in the action, and hence it is to be tested by its substance rather than its form. While the form suggested is preferable, the one used is neither fatal nor prejudicial.

Judgment affirmed.

HOLCOMB, C. J., MACKINTOSH, MAIN, and PARKER, JJ., concur.

[No. 15592. Department Two. December 17, 1919.]

CLARENCE L. REAMES, *Respondent*, v. L. H. HEYMANSON, *Personally and as the Puget Sound Cap Manufacturer, Appellant.*[1]

DAMAGES (98)—PLEADING—VARIANCE—GENERAL OR SPECIAL—PERSONAL INJURY. In an action for personal injuries, where the effects of the accident upon the plaintiff's eyes resulting in a diminution of vision were fully set forth in the complaint, it is competent for an expert to give his opinion that the diminution of vision was the result of a fracture of the skull, although such fracture was not specially pleaded, there being no suggestion of surprise, defendant's witnesses having examined plaintiff and being of the opinion that there was no fracture.

MUNICIPAL CORPORATIONS (392)—TRIAL (101)—USE OF STREETS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In view of defendant's requested instructions as to plaintiff's duty to look for approaching vehicles while on a cross-walk, and of evidence tending to show that he was struck by defendant's car while on the sidewalk, failure to give further instructions as to his contributory negligence, if he failed to look for a car while on the cross-walk, is not prejudicial error.

Appeal from a judgment of the superior court for King county, Pemberton, J., entered May 27, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian struck by an automobile. Affirmed.

Preston, Thorgrimson & Turner, for appellant.

Tucker & Hyland, for respondent.

TOLMAN, J.—This is an appeal from a judgment entered on the verdict of the jury in a personal injury case. The complaint charges negligence on the part of appellant in driving his automobile, without chains or anti-skid devices, down a sixteen per cent grade on Marion street, between Third and Fourth avenues, in

[1]Reported in 186 Pac. 325.

the city of Seattle, when the street was in a wet and slippery condition, at an excessive rate of speed; failure to give warning; reckless driving, and that the machine was not in proper repair as to brakes and steering gear, resulting in appellant's running his machine upon the sidewalk near the intersection of Marion street and Third avenue, striking respondent, and inflicting the injuries which are described in the amended complaint, as follows:

"That the said plaintiff was rendered unconscious and remained unconscious and semi-conscious for a period of approximately twenty-four hours; that the fifth and sixth ribs upon the right side were cracked at the junction of the middle and outer third; that the muscles attached to the ribs were torn and bruised by the violence of the injury; that there was a contused, lacerated wound near the external canthus of the left eye; there was another wound of a similar character involving the left eyebrow and extending down upon and nearly through the upper portion of the left eyelid.

"That by reason of the injury aforesaid, there is a diminution of the visual acuity of both eyes, the right being 6/7th and the left being 6/7th minus 1. That there is a cloudiness of the right frontal sinus by reason thereof, and there is an occlusion, partial, of the left supraorbital vein, edema of the left upper lid, and a tenderness of the left supraorbital notch. That there is a contraction of the form field for white, red and blue, and enlargement of the blind spot, left, for both white and red. That there is a permanent diminution of the vision to the extent of one-sixth of said total vision.

"That the plaintiff lost two teeth by reason of the injury aforesaid, and the said injury caused permanent injury to all of plaintiff's teeth.

"V. That by reason of the facts aforesaid, the plaintiff was made to and did suffer great bodily pain and mental anguish, and severe and permanent ner-

vous shock, and has been permanently injured as aforesaid."

The further facts, so far as necessary to an understanding, will appear as the points in issue are discussed.

It is first claimed that the trial court committed error in permitting the physician called as an expert witness on behalf of respondent, after having described the external injuries, the condition of the eyes, and that respondent complained of pain and tenderness in that region, over objection, to testify that, in his opinion, the condition of the eyes and the pain were caused by a small fracture of the skull down in the eyesocket where it could not be discovered by the X-ray examination; that this opinion was an inference drawn from the conditions which he had already described substantially in the language of the complaint, and, on cross-examination, the witness stated that this opinion was a conjecture on his part. There is no element of surprise involved, as appellant's physicians testified that they had fully and carefully examined respondent for evidences of a fracture of the skull, and found none, and gave reasons why, in their opinions, no such fracture could have existed; so that the cold question as here presented is as to whether or not it was error to permit a witness to give his opinion as to what caused the conditions which were pleaded.

The rule is, of course, well established that where one sets forth in his complaint certain definite and specific injuries, for which damages are claimed, he will not be permitted to give evidence, over objection, of other injuries not specified, but the injuries of which proof will be admitted must be such as are described, or would be expected naturally to result from those described, either specifically or generally (*Eckhart v. Peterson*, 94 Wash. 379, 162 Pac. 551); but here

the pleader's mistake, if it be a mistake, appears to have been in pleading the effect instead of the cause. The effect of the accident upon the eyes, resulting in the claim of diminution of vision, was fully set forth in the complaint, and if, when the cause is pleaded, the natural and probable effect may be shown, why may not the rule work both ways, and in such a case as this, where the damages sought are for diminution of sight, fully described, why may not the cause of such diminution be shown though not specifically pleaded, especially if the opposing party be not misled to his injury. So far as giving notice to the adverse party is concerned, the pleading of the effect without the cause would appear to accomplish the purpose much more certainly than pleading the cause without the effect. Numerous authorities have been cited pro and con, which we have examined with care. Each case appears to be decided upon the peculiar facts involved, and little enlightenment would follow from a discussion of the authorities here. We find nothing in such cases, however, that we deem to be authority against the ruling of the trial court on this question, especially when it is remembered that appellant might have fully protected himself from any possible wrongful effect of such testimony upon the jury by requesting an instruction to the effect that respondent could recover only for the injuries described in his complaint, and that this testimony should be considered only as bearing upon such described injuries, and not as introducing a new condition upon which other and further damages might be allowed.

By proper assignments of error, the appellant raises the point that the question of contributory negligence, pleaded generally in his answer, was not properly submitted to the jury. Appellant's theory of the case was that the collision occurred upon a

cross-walk, while respondent's contention was that he was struck in the back after he had crossed Marion street and was proceeding north upon the Third avenue sidewalk. The court correctly gave the instruction requested by appellant defining respondent's duty to look for approaching vehicles while on the cross-walk and gave an instruction to the effect that, if respondent was upon the sidewalk, he had a right to assume that automobiles would not be driven thereon. In the light of all the evidence, we cannot say that the court should have given a further requested instruction to the effect that if, under all the circumstances, the jury should find that the respondent saw, or should have seen, the approaching car while he was on the cross-walk, and if they should further find that, if he so saw, or should have seen, the approaching car, he would have been able to avoid being struck thereby after he had entered upon the sidewalk, then his failure to so avoid the collision would be contributory negligence.

We have examined the instructions as a whole in the light of all the testimony, and conclude that the case was fairly submitted to the jury, and that no reversible error is disclosed by the record.

Judgment affirmed.

HOLCOMB, C. J., MOUNT, BRIDGES, and FULLERTON, JJ., concur.

[No. 14999. Department One. December 18, 1919.]

OSCAR WIRKKALA *et al.*, *Plaintiffs*, v. WIRKKALA BROTHERS LOGGING COMPANY, *Defendant*. MULTNOMAH LUMBER & BOX COMPANY, *Appellant*, v. M. H. SCHMEER, *Respondent*.[1]

CORPORATIONS (224) — RECEIVERS — POWERS — REPRESENTATION OF CREDITORS. As the receiver of an insolvent corporation represents the creditors, he may avoid a transaction whereby the corporation had given a bill of sale in fraud of creditors and taken back a lease of donkey engines which in fact belonged to the corporation.

RECEIVERS (72)—REMEDIES OF RECEIVER IN RECEIVERSHIP PROCEEDINGS. Where the receiver of an insolvent corporation had a right, on behalf of creditors, to avoid a bill of sale and lease made in fraud of creditors, and all the parties are before the court upon an order to show cause why he should not deliver the property pursuant to the fraudulent bill of sale, he may interpose the fraud by way of an affirmative defense, and the court has jurisdiction to determine the merits without resort to an independent action.

Appeal from a judgment of the superior court for Wahkiakum county, Hewen, J., entered April 4, 1918, upon overruling a demurrer to the answer, upon the hearing of an order directing a receiver to show cause why property in his possession should not be delivered to the petitioner. Affirmed.

John K. Kollock, for appellant.

Cake & Cake, for respondent.

MACKINTOSH, J.—The Multnomah Lumber & Box Company, on November 4, 1916, delivered to Wirkkala Brothers Logging Company two written leases covering three donkey engines which were to be used by the lessee in its logging business. After the execution of the leases, the respondent was appointed receiver of the Wirkkala Brothers Logging Company, in an action

[1]Reported in 186 Pac. 315.

instituted by the stockholders of the company. At the time of the receiver's appointment, the donkey engines were in the possession of the logging company. Multnomah Lumber & Box Company, the appellant, filed in the original proceedings wherein the receiver was appointed a petition that the receiver show cause why he should not be compelled to deliver to the box company the donkey engines in accordance with the terms of the leases, which provided that the donkey engines be returned to the box company upon the completion of a certain logging contract. The receiver filed an answer to the order in which he plead certain affirmative defenses, with only one of which we are interested here, namely, that the donkey engines in question, prior to the leases, were in the possession of the Wirkkala Brothers Logging Company, and that, as part of one transaction, the logging company had executed bills of sale of the donkey engines to the box company, and that the box company had then executed the leases; that this transaction was a pretense and a sham and was not entered into in good faith, but was intended to conceal the uninterrupted possession by the logging company and avoid the necessity of recording the bills of sale and leases, and that such was in fraud of creditors, and that the box company had no right, title or interest in or to the donkey engines, and that the entire transaction had been made while the logging company was insolvent. Demurrers were interposed to this affirmative defense and overruled, which ruling raises the question involved in this appeal.

It is the position of the appellant that the receiver, upon his appointment, had no greater right than the logging company, and that neither the logging company nor the receiver should be permitted to deny the title of the box company, relying upon the general rule that a bailee, when he receives property by bailment

legally, admits the right of the bailor to make the contract of bailment, and that the bailee cannot, for his own benefit, deny the title of the bailor. The error in this position consists in the fact that, although the receiver of the insolvent company stands in the shoes of the corporation and has the same rights which the insolvent corporation has, he also has a greater authority and responsibility, for he is the representative, not only of the insolvent corporation, but of the creditors, and, as such, he has the right to resist actions which may be begun to enforce transactions entered into by the corporation in fraud of its creditors and may avoid such actions as would consummate a fraud upon the creditors. By demurrer, the appellant admits the allegations of the answer which set up an illegal and fraudulent conspiracy to defraud the creditors of the logging company, and the receiver, having the authority which we have noted, had a right, on behalf of the creditors, to take and maintain the position that the entire transaction was fraudulent, although, had he been solely representing the corporation, he would have been bound by the rule of law contended for by the appellant. As was said in *In re Wilcox & Howe Co.*, 70 Conn. 220, 39 Atl. 163:

" 'The receiver for most purposes represents and stands in place of a corporation, and can enforce only such contracts and rights as it could enforce. But when acts have been done by the corporation in violation of law and in fraud of creditors, the receiver, who for all beneficial interests connected with the trust is regarded as a representative of the creditors, may repudiate their acts, taking care, however, that third parties who are without fault do not suffer. Such cases, however, are exceptions to a general rule, and it should clearly appear that the case is within the exceptions.' . . . As the receiver is thus a representative of the corporation for some purposes, and may for such purposes be called its personal repre-

sentative within the meaning of the statute, and as he also represents creditors for some purposes, the precise question here is, whether the receiver, *quoad* these conditional contracts of sale and the property covered by them, is the personal representative of the corporation within the meaning of the statute; and we are of opinion that he is not. The commencement of proceedings for the appointment of a receiver of a corporation, or of a copartnership, dissolves all attachments and all levies of executions not completed, made within sixty days next preceding, on the property of the corporation or copartnership. [Statutes of Connecticut.] And by the appointment of a receiver the rights of creditors to attach or levy upon such property are suspended. . . . The law thus disables the creditors from interfering with that property, or from in any way appropriating it for their sole benefit; but in so doing it does not lessen their rights with respect to such property, nor does it destroy them; it merely provides for their protection and enforcement in another way. And whenever the law thus disables creditors from helping themselves, whether by proceedings in insolvency or bankruptcy, or by the appointment of a receiver or otherwise, it provides for the enforcement of whatever rights they may possess against the property of the debtor, through the instrumentality of its agent, the trustee, assignee or receiver. For the purpose of enforcing any such right which the creditor could have enforced for his sole advantage, and for the purpose of holding or taking any property which a creditor could hold or take by law, or for recovering back any property of which a creditor could avail himself in payment of his debt, the trustee, assignee, or receiver is in effect the creditor. . . ."

In the case of *Washington Mill Co. v. Sprague Lumber Co.*, 19 Wash. 165, 52 Pac. 1067, we followed the same course of reasoning, and said:

"It is contended by the learned counsel for appellant that, inasmuch as the Lumber Company and all of its stockholders have at all times recognized the note

and mortgages as valid and subsisting obligations against the corporation, neither the stockholders nor the corporation can now be heard to say that they are invalid, and that the creditors of the corporation are in no better position in that regard than the stockholders themselves. But, assuming for the present, that the validity of the mortgages cannot be called in question by the stockholders, all of whom authorized their execution, it by no means follows that they are good against the creditors of the Lumber Company or their representative, the receiver. The receiver of an insolvent corporation represents not only the corporation, but also the stockholders and creditors, and it is his duty to assert and protect the rights of each of these classes of persons. . . . And as a representative of creditors, the receiver is vested with rights not possessed by the corporation. . . . In behalf of creditors he may disaffirm acts of the corporation, and maintain actions to set aside transfers and conveyances of the corporate property made in fraud of their rights."

The case of *Springer v. Ayer,* 50 Wash. 642, 97 Pac. 774, contains the statement:

"The receiver represents the creditors, and it is his duty to guard the interests of all of them when he is advised what the interests are."

In *Spencer v. Alki Point Transportation Co.,* 53 Wash. 77, 109 Pac. 509, 132 Am. St. 1058, this rule of law received further sanction.

On argument, the appellant contended that, in this action, it was only seeking possession of the donkey engines and that the court should not inquire into the matters raised by the affirmative answer, but should have ordered delivery according to the terms of the leases, and that thereafter the receiver might begin suit against the appellant based upon the fraud as alleged in his answer. In other words, that the proper procedure would be for the court, with one hand, to take

from A and give to B, and then, with the other, reach out and take from B to return to A. There may be some situations in which such procedure is necessary, but, as we view the situation here, it is unnecessary. All the parties are before the court, and the receiver holding the property has a right, on behalf of the creditors, to assert that the claim being made for its possession by the appellant is based upon a fraudulent and collusive scheme.

The judgment decreeing the bills of sale and leases to be cancelled as to the creditors is affirmed.

HOLCOMB, C. J., MITCHELL, PARKER, and MAIN, JJ., concur.

[No. 15470. Department One. December 18, 1919.]

LARS HOLLAND, *Respondent*, v. CHRISTIAN TJOSEVIG, *Appellant*.[1]

PRINCIPAL AND SURETY (59)—REMEDIES OF SURETY—AGAINST PRINCIPAL AFTER PAYMENT OF DEBT. Where one of two makers of a joint and several note signed as an accommodation maker and surety only, the other receiving all the consideration, he may, upon paying the note, recover the amount paid from his comaker.

EVIDENCE (150, 160)—PAROL EVIDENCE TO VARY WRITING—LIABILITY OF SURETY ON NOTE—EXTENT. As between the makers of a joint and several note, oral evidence is admissible to show that one of the parties was in fact a surety, and the other primarily liable and bound to reimburse the surety paying the note.

LIMITATION OF ACTIONS (41)—COMPUTATION OF TIME—REIMBURSEMENT FROM PERSON ULTIMATELY LIABLE. An action against the principal maker of a promissory note upon the implied obligation which arose when the surety paid it does not accrue until the note was paid, and the statute begins to run from that time.

SAME (67, 74)—TOLLING STATUTE—ACKNOWLEDGMENT—PERSONS BY WHOM MADE AND TO WHOM AVAILABLE. Principal and surety upon a promissory note are not within the rule that acknowledgment by one partner of a partnership debt after dissolution of the partner-

[1]Reported in 186 Pac. 317.

ship does not deprive the other of the benefit of the statute of limitations.

SAME (87)—PLEADING STATUTE AS DEFENSE—NECESSITY. Where a statute of limitation is pleaded in the complaint, it may be invoked by the defendant although not pleaded in his answer.

Appeal from a judgment of the superior court for King county, Hall, J., entered April 4, 1919, upon findings in favor of the plaintiff, in an action for money paid, tried to the court. Affirmed.

Henry Gulliksen, for appellant.

Smith, Chester & Brown, for respondent.

MAIN, J. — The purpose of this action was to recover money which the plaintiff had paid on a promissory note, he claiming that it was the primary obligation of the defendant. The cause was tried to the court without a jury, and resulted in findings of fact, conclusions of law and a judgment sustaining the plaintiff's right to recover. From this judgment, the defendant appeals.

On April 6, 1908, the appellant and respondent, at Valdez, Alaska, signed and delivered a promissory note payable to A. L. Levy & Company, and due six months after date. The note was a joint and several obligation upon which both of the parties signing were liable as principals. On September 19, 1913, the respondent paid the note to the holder thereof. In the complaint, two Alaska statutes are pleaded, one relative to the interest rate in that district, and the other the statute of limitations. The latter statute, among other things, provides that an action upon a contract, express or implied, shall be barred after the lapse of six years. When the cause was called for trial, the defendant asked leave to file an amended answer in which he sought to plead the same statute

of limitations as a defense. This request, upon objection by the respondent, was refused by the court. The present action was begun on February 11, 1918, or within six years after the respondent had paid the note.

The first question is whether the evidence sustains the finding of the trial court that the appellant was the sole beneficiary of the consideration for which the note was given. The testimony upon this question took a somewhat wide range. The trial court, as already indicated, found that, as between the parties to this action, who were the makers of the note, the respondent signed as an accommodation maker and in the capacity of a surety, and that the appellant had received the entire consideration for which the note was given. As we view the record, the preponderance of the evidence sustains the findings of the trial court.

The next question is whether oral testimony is admissible to show that, as between the makers of a note, one of the parties was in fact a surety and that the obligation was primarily that of the other signer, where the parties as to the holder were jointly and severally liable. Upon this question the rule is that, as between the makers of a note and the holder, all are alike liable, all are principals, but that, between themselves, their rights depend upon other questions, and these rights may be determined by oral testimony. *Robison v. Lyle,* 10 Barb. (N. Y.) 512; *Apgar's Adm'rs v. Hiler,* 4 Zab. (N. J. L.) 812. In the latter case it was said:

"But it was clearly competent for the plaintiff to show in what relation the several signers of the note stood to each other—as to the payee they were all principals, and all bound jointly and severally to pay the debt. But their relation to each other depended not upon the form of the note, nor whether their names

were signed first or last to the note, but upon the character in which they became parties to the note, and the agreement or contract made among themselves at the time of signing. This was matter *in pais* proper to be proved by parol. And though the memorandum imports *prima facie* that Apgar and Hiler were joint securities, it was competent for the plaintiff to show whether they were securities for Fisher alone, or for each other also."

As to the statute of limitations, the appellant claims that the statute runs from the due date of the note. The respondent claims that the statute was not set in motion until he paid the note. This is not an action upon the note, but upon an implied obligation which arose when the respondent paid the note, upon which he, as related to the appellant, was a surety. The cause of action did not accrue until the note was paid, and the statute of limitations then began to run. *Reid v. Flippen,* 47 Ga. 273; *Shepard v. Ogden,* 3 Ill. 257; *Wilson v. Crawford,* 47 Iowa 469; *Barnsback v. Reiner,* 8 Minn. 59; *Thayer v. Daniels,* 110 Mass. 345.

In the last case cited, it was said:

"There was an implied promise on the part of the defendant, as principal, to indemnify the surety, and to repay to him all the money that he might be compelled, in consequence of his liability as surety, to pay to the creditor. Until the surety has been compelled to make such payment, there is no breach of this implied promise. The cause of action accrues then for the first time, and the statute of limitations then begins to run. Of course, the exception that the claim of the plaintiff is barred by that statute cannot be maintained."

In this case the respondent paid the note on September 19, 1913. The cause of action arose when the note was paid by respondent. The statute of Alaska permits an action to be maintained upon an implied obligation within six years after the cause of action

accrued. The present action was instituted on the 11th day of February, 1918, and within the six-year period, and hence was not barred by the statute of limitations.

The appellant cites a line of cases which hold that the acknowledgment by one partner of a partnership debt, after the dissolution of the partnership, does not deprive the other partner of the benefit of the statute of limitations. This rule, however, has no application to the facts in the present case. The parties here were not partners but the makers of a promissory note, and, as between themselves, one was a principal and the other a surety.

Some complaint is made of the ruling of the trial court in refusing to permit the amended answer to be filed. Upon this question it only need be said that by this ruling the appellant was not prejudiced. He sought to plead as a defense a statute which had been set out in the complaint. Upon the trial, he was not denied the right to offer any testimony by reason of the fact that the amended answer was not filed. The statute of limitations, having been pleaded in the complaint, could be invoked by the appellant in his behalf, even though not pleaded in the answer.

The judgment will be affirmed.

HOLCOMB, C. J., MACKINTOSH, MITCHELL, and PARKER, JJ., concur.

[No. 15515. Department One. December 18, 1919.]

ROY JOHNSON, *Respondent*, v. ALEXANDER PEARSON, *as Pearson Construction Company, Appellant*.[1]

MASTER AND SERVANT (17)—ACTION FOR WAGES—COMPLAINT. A complaint states a cause of action on *quantum meruit* for services performed when defendant sent plaintiff to superintend certain construction work engaged in by defendant, as alleged, without any agreement for the payment of a definite sum or any contract for a specified commission.

WORK AND LABOR (5)—SALARY—QUANTUM MERUIT. Where plaintiff was employed to superintend construction work, and the jury, on a direct conflict in the evidence, found that there was no contract as to the pay, plaintiff may recover on *quantum meruit*.

EVIDENCE (135, 135-1) — DOCUMENTARY EVIDENCE — PRODUCTION — PAPERS SUBJECT TO PRODUCTION. It is not error to admit in evidence papers and documents which respondent had the right, upon demand, to have produced by the appellant, regardless of whether or not they were wrongfully taken or obtained.

TRIAL (101)—INSTRUCTIONS—REQUESTS. It is not error to refuse requested instructions fully covered in the general charge.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 19, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Arthur C. Dresbach, for appellant.

Jay C. Allen, for respondent.

MAIN, J.—The complaint in this action states two causes of action, one upon the *quantum meruit* for the balance due for services rendered, and the other for money paid out and expended in behalf of the defendant. After the issues were framed, the cause was tried to the court and a jury, and resulted in a verdict

[1]Reported in 186 Pac. 667.

in favor of the plaintiff on both causes of action. From this judgment, the defendant appeals.

The appellant, for many years, had been engaged in the general contracting business, with his principal office in the city of Seattle. The respondent, for four or five years prior to the month of December, 1917, was in his employ, first as a stenographer and bookkeeper, and later as an estimator. Some time early in the year 1917, the appellant entered upon the performance of a contract in the city of Portland, Oregon, which involved a large sum of money. The respondent, at about this time, was sent to Portland, as he claims, in the capacity of a managing superintendent. The appellant claims that he was to have charge of the office there and work in the same capacity that he had in the Seattle office. The respondent, by his first cause of action, seeks a recovery for the balance due on *quantum meruit* for salary earned, claiming that, when he went to Portland, he had no agreement and could not secure one from the appellant, either as to salary or as to a commission. The appellant claims that the respondent's compensation was to be twelve per cent of the net profits on the Portland job, and that, since the contract was a losing venture, he was entitled to nothing. The respondent left the employment of the appellant in the month of December, 1917, and thereafter brought this action. The appellant demurred to the complaint, and predicates error upon the action of the court in overruling the same. The complaint recites facts as the respondent viewed them, alleging that he was unable to secure a contract upon the Portland work in a definite sum or a contract for a specified commission, and seeks recovery on the *quantum meruit*. The complaint states a cause of action, and the demurrer was properly overruled.

The second point is that the action should be dismissed because the evidence showed that the respondent was working on a commission basis and that there had been a loss in the undertaking. Upon this question the evidence of the respective parties was in direct conflict and plainly presented a question for the determination of the jury. The jury apparently having found, under the instructions submitting the cause to them, that there was no contract for a fixed amount and no agreement as to the commission, the respondent had a right to recover upon the *quantum meruit*. *Rainey v. Pearce,* 102 Wash. 536, 173 Pac. 328.

There is some discussion in the briefs relative to certain papers and documents which the respondent took from the appellant's office when he resigned from the employment. The controversy over these papers arose on a Friday during the progress of the trial, and the court directed that the papers be turned over to the appellant, which was there done. The trial was not concluded on that day and was resumed on the following Monday. It thus appears that the appellant had ample opportunity to examine the papers and make such use of them as he desired. Whether the papers were wrongfully taken from the appellant's office or whether they were personal papers of the respondent is not material here. Certain of them were introduced in evidence by the respondent, over the objection of the appellant, but there was no error in this regard. The letters and papers offered in evidence by the respondent are all such that, had they not been in his possession, he would have had a right, upon demand, to have had them produced by the appellant.

Some complaint is made because the court declined to give certain instructions requested by the appellant. The instructions given clearly, concisely and accu-

rately covered the law of the case. This was all that was necessary.

The judgment will be affirmed.

HOLCOMB, C. J., MACKINTOSH, MITCHELL, and PARKER, JJ., concur.

[No. 15525. Department One. December 18, 1919.]

J. L. BURGESS, *Appellant*, v. F. L. CONFORTH *et al.*, *Respondents*.[1]

FRAUDULENT CONVEYANCES (93)—TRANSACTIONS BETWEEN HUSBAND AND WIFE—EVIDENCE—SUFFICIENCY. The transfer by a husband to a wife of corporate stock in pursuance of a prenuptial agreement is supported by a sufficient consideration and will not be held fraudulent as to community property creditors where there were no facts or circumstances to overcome the positive oral evidence as to the *bona fides*.

SAME (93). A husband and wife's mortgage of an automobile to secure an indebtedness due from the husband, executed prior to recovery of judgment against husband and wife, is supported by a sufficient consideration, and is not fraudulent as to the judgment creditors, where there were no facts or circumstances to overcome positive oral evidence as to the *bona fides*.

Appeal from a judgment of the superior court for King county, Smith, J., entered March 15, 1919, upon granting a nonsuit, dismissing an action for equitable relief, tried to the court. Affirmed.

Elias A. Wright and *Sam A. Wright*, for appellant.

J. P. Wall, for respondents.

MAIN, J. — The purpose of this action was to set aside the transfer of certain personal property, alleged to have been made in fraud of creditors. The cause was tried to the court without a jury. At the conclusion of the plaintiff's evidence, the defendant chal-

[1]Reported in 186 Pac. 263.

lenged the sufficiency thereof and moved for a dismissal of the action. This motion was sustained and a judgment of dismissal entered, from which the plaintiff appeals.

The facts may be summarized as follows: The appellant holds two judgments against the respondent F. L. Conforth and the community consisting of himself and wife. These judgments arose out of an accident occurring to the appellant and one W. J. Mayouck on December 12, 1917. Thereafter the appellant and Mayouck each brought actions, the former recovering a judgment on July 2, 1918, and the latter on June 29, 1918. Prior to the institution of the present action, the Mayouck judgment was assigned to the appellant. Mr. and Mrs. Conforth were married on May 25, 1917. The property the transfer of which is claimed in this action to be fraudulent was fifty-one shares of stock in the Guarantee Manufacturing Company, a corporation, and an automobile. The stock was transferred by Mr. Conforth on August 17, 1917, to Mrs. Conforth. The automobile, on April 5, 1918, was mortgaged to the Guarantee Manufacturing Company to secure a balance of the indebtedness then due to the company from Mr. Conforth.

The evidence relative to the transfer of the stock consists largely of the testimony of Mr. and Mrs. Conforth. Each of them testified that the transfer of the stock was made in pursuance of a prenuptial agreement. Their testimony was that, prior to the marriage, Mr. Conforth had agreed to give to Mrs. Conforth the stock in consideration of the marriage, and that the subsequent transfer was the carrying out of this agreement. The appellant strenuously contends that the stock was not transferred until August 17, 1918. The trial court, however, did not disbelieve the testimony of Mr. and Mrs. Conforth, and the record furnishes

no reason for this court to conclude that they testified other than truthfully on this matter. As to the automobile, the evidence shows that, prior to the time of the accident, there had been a crude attempt to transfer it to the corporation as security for a loan. Subsequently, and before the judgments above mentioned were obtained, a note secured by a mortgage, properly executed, was given to secure the balance of the indebtedness then due. The mortgage was filed for record, as required by law. The evidence in the case consisted largely in the testimony of adverse witnesses placed upon the stand by the appellant and subject to cross-examination. The testimony as to both the stock and the automobile was positive as to the *bona fides* of the transactions. The record furnishes no facts or circumstances which would overcome the oral testimony of the witnesses and justify the court in holding that either of the transactions was fraudulent. Both occurred prior to the time the judgments were obtained and each was supported by an adequate consideration. The questions in the case are solely those of fact.

The judgment will be affirmed.

HOLCOMB, C. J., MACKINTOSH, MITCHELL, and PARKER, JJ., concur.

[No. 15431. Department Two. December 22, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v. JAKE HERWITZ, *Appellant*.[1]

CRIMINAL LAW (216, 217)—TRIAL—UNLAWFUL COMMENT ON EVIDENCE. Where, during examination of a witness, counsel emphatically insinuated that the witness is testifying falsely, he is properly rebuked by reminding him that he was not a witness.

SAME (217). It is not unlawful comment, in rejecting certain exhibits the materiality of which did not then appear, to give reasons for excluding them; nor, when subsequently admitted, would the evidence be discredited because once rejected.

SAME (217). Upon a direct issue as to the credibility of one of the witnesses testifying on a material point, it is unlawful comment, within the prohibition of Const., art. 4, § 16, for the trial judge to state to the witness that his record is as good as anyone's and that he is a perfectly credible witness and has not been impeached.

SAME (391-1)—APPEAL (444)—COMMENT ON EVIDENCE—CURE BY INSTRUCTIONS. Unlawful comment on the evidence of a prejudicial nature in violation of Const., art. 4, § 16, cannot be cured by instructions to the jury to disregard it.

CRIMINAL LAW (292)—INSTRUCTIONS—REASONABLE DOUBT. It is error to refuse to instruct that reasonable doubt may arise from lack of evidence as well as from the evidence given, where the instructions elsewhere given did not cover the point.

Appeal from a judgment of the superior court for King county, Frater, J., entered October 15, 1918, upon a trial and conviction of larceny. Reversed.

Jones, Riddell & Brackett and *Paul Carrigan* (*Piles & Halverstadt*, of counsel), for appellant.

Fred C. Brown and *John D. Carmody*, for respondent.

FULLERTON, J.—The appellant was convicted of larceny, and appeals from the judgment and sentence pronounced against him.

[1]Reported in 186 Pac. 290.

The appellant conducts a pawn-shop in the city of Seattle. One Tyrrell, on three separate occasions, purchased from him gold coins for currency, paying a premium of five per cent. On one of these occasions, the appellant told Tyrrell that he could procure for him all of the gold he wished for a like premium. At a day later than the last of these purchases, Tyrrell, according to his testimony, left with the appellant eight hundred dollars in currency, for which the appellant agreed to procure for him a like amount in gold coin to be delivered in the afternoon of the same day on his paying the usual premium. The appellant did not procure the coin as agreed, nor at any time, and refused to return the currency. It was for the larceny of the currency that the appellant was convicted.

The appellant assigns that the court erred, (1) in commenting, in the course of the trial, derogatory of the appellant's counsel; (2) in commenting in a manner derogatory of the evidence of the appellant; (3) in commenting on the evidence; and (4) in its instructions to the jury.

With reference to the first assignment, a witness for the state had testified to a conversation between the appellant and Tyrrell concerning the disposition of the currency which he had overheard and which he said occurred in the business place of the appellant. On cross-examination, the witness was interrogated relative to the persons present at the time of the conversation, stating that among the persons at the place was the clerk of the appellant, who was on the other side of a counter immediately in front of the witness. He further stated that the conversation between Tyrrell and the appellant was conducted "in a fairly large tone of voice, not extraordinarily large," but

that he was certain that the clerk did not hear it. The record then discloses the following:

"Mr. Carrigan (cross-examining): Q. You say the man was right across the counter from this conversation and did not hear it? A. Sure. Q. You are pretty sure he did not hear it? A. I am. Q. You are pretty sure he did not hear any such conversation? A. Yes. Mr. Carrigan: I am equally sure of that. The Court: You had better be sworn, Mr. Carrigan, before you testify."

No exception was taken to the court's remark, and the cross-examination proceeded with regard to other matters. The appellant insists that the remark of the court tended to discredit his counsel before the jury and was so far prejudiced as to entitle him to a reversal. But we cannot so regard it. The statement of counsel was in itself improper. It contained the insinuation that, in the belief of counsel, the conversation related by the witness did not occur and that the witness had testified falsely. While at the appropriate time in the course of a trial counsel may properly argue to the jury that a witness' testimony is unworthy of credence because indicative of bias or prejudice, or is out of the ordinary, or for other causes appearing in the record, the appropriate time is not when the witness is testifying. The remark, therefore, merited rebuke, and the court did not overstep its proper bounds in administering a rebuke. Nor do we think the form of the rebuke objectionable. Counsel made an emphatic statement as to his belief concerning a matter which was the subject of inquiry, and it was not inappropriate to remind him that he was not a witness.

During the examination of the appellant, he testified concerning a purchase of gold pieces he had made from a third person in the presence of the prosecuting

witness, and concerning a pennant which he copyrighted. These were offered in evidence and rejected on objection from the state, the court remarking: "I do not think they are material unless disputed. They might become material. The objection on the ground of materiality is sustained. There is nothing material about them. Proceed."

After the examination had proceeded further, a separate offer of the gold pieces was made and they were admitted without objection. The remarks of the court at the time of the first offer forms the basis of the second assignment of error. But while it may be that the court went further in giving his reasons for rejecting the testimony than the circumstances warranted, we cannot think there was error committed. At this time, the materiality of the exhibits did not appear, and it was not a comment on the evidence within the meaning of the constitutional prohibition for the court to give a reason for excluding them. *State v. Surry,* 23 Wash. 655, 63 Pac. 557; *Dunkin v. Hoquiam,* 56 Wash. 47, 105 Pac. 149; *State v. McDowell,* 61 Wash. 398, 112 Pac. 521, Ann. Cas. 1912C 782, 32 L. R. A. (N. S.) 414. Nor can we think the exhibits were in any way discredited because once rejected on the ground of immateriality. By their subsequent admission as evidence the jury would understand that the court deemed them material for their consideration, and would understand, also, that the change of opinion on the part of the court arose because of the facts developed in the further progress of the trial. Plainly, they could not have understood that evidence rejected because of immateriality when first offered was so regarded by the court when afterwards admitted.

The appellant, while a witness in his own behalf, denied that the prosecuting witness had ever left with

him the sum of eight hundred dollars, or any sum, for the purchase of gold, or for any purpose, and gave a very plausible explanation of the other circumstances thought by the state to inculpate him. In the main he was corroborated by his clerk, and was able to, and did, procure witnesses who testified to his honesty and veracity. In rebuttal, the state called a police officer who testified that the appellant stated, at the time of his arrest, that the only time he had seen the prosecuting witness was when the prosecuting witness was at his place of business for the purpose of buying a pendulum clock. It had been given in evidence that the prosecuting witness had been at the appellant's place of business at one time for the purpose indicated, and in cross-examination the officer was questioned somewhat closely whether the appellant had used the word "only" when stating the fact to him. In the course of the cross-examination, the officer evidently thought his veracity was being questioned, and volunteered the remark that he was perfectly willing to compare his record with the record of his cross-examiner. At this stage of the proceedings, the court interrupted the proceedings, saying to the witness:

"Your record is just as good as anybody's when you are under oath here, as far as this court is concerned, and this jury, too. You are a perfectly credible witness before this court, and you have not been impeached."

These remarks of the court furnish the foundation for the third assignment of error. It is contended that it is within the prohibition of § 16, art. 4, of the state constitution, which provides that judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law. That it was a comment on a matter of fact, there can be but little question. There was an issue as to whether the ap-

pellant had stated to the witness, or in the hearing of the witness, that the only time he had seen the prosecuting witness was when the witness was at the appellant's place of business for the purpose of purchasing a pendulum clock, and on this question there was, on the one side, the evidence of the appellant disputing the statement, while on the other, there was the evidence of the witness affirming it. The credibility of the respective witnesses was thus at issue, and for the judge to declare that one of the witnesses was "a perfectly credible witness before this court," and that he had "not been impeached," was plainly a comment adverse to the appellant on a matter of fact which was the sole province of the jury to determine. Standing alone, therefore, it was manifest error, requiring a reversal of the judgment of conviction which was afterwards pronounced against the appellant. *State v. Coella,* 3 Wash. 99, 28 Pac. 28; *State v. Walters,* 7 Wash. 246, 34 Pac. 938, 1098; *State v. Crotts,* 22 Wash. 245, 60 Pac. 403; *State v. Primmer,* 69 Wash. 400, 125 Pac. 158; *State v. Jackson,* 83 Wash. 514, 145 Pac. 470; *State v. Smith,* 103 Wash. 267, 174 Pac. 9; *Eckhart v. Peterson,* 94 Wash. 379, 162 Pac. 551.

The trial court, however, at the time exception was taken to his remarks, instructed the jury that they were to be given no consideration by them, and in his general instructions told them that they were the exclusive judges of the facts and of the credibility of the witnesses. It is the contention of the state that the error committed by the comment was cured by these instructions and that reversible error cannot now be predicated thereon. There are, of course, many errors which may be committed at one stage of the trial that can be arrested and cured by the action of the court at a later stage. Without specifically referring to the cases, we have held that error committed in admission

of incompetent, irrelevant or immaterial evidence can be cured by the subsequent withdrawal of the evidence from the jury, and have held that improper remarks of counsel, although in nature prejudicial, can be cured by instructing the jury to disregard them. But no case has been cited us, and we can recall none, where we have held that a comment by the trial judge on the evidence, prejudicial in its nature, can be cured by a subsequent instruction to the jury to disregard it. On the contrary, the criminal cases above cited proceed upon grounds inconsistent with such a theory, and the civil case cited directly holds that it cannot. In the latter case (*Eckhart v. Peterson*, 94 Wash. 379, 162 Pac. 551), the action was for personal injuries suffered as the result of an assault and forcible rape. A witness was testifying to certain indecent liberties he had with the plaintiff, and to an offer on her part to submit to an act of sexual intercourse for money. In the course of his testimony, an objection was interposed, which the court overruled, the judge remarking when making the ruling: "You might call the prosecutor in here though—never mind, go ahead with the story." This was assigned as error, and this court, speaking by Chief Justice Ellis, used this language:

"This was a most damaging comment, either upon the character of the witness or upon the credibility of his testimony. True, no exception was taken to the court's remark, and he did instruct the jury in his general charge and in a general way to disregard any remarks of court or counsel. But under the rule announced in *State v. Jackson*, 83 Wash. 514, 522, 145 Pac. 470, these things cannot be permitted to preclude an insistence by a party upon his constitutional right to have his evidence submitted to the jury without comment by the court, when, as here, we cannot say that an instruction to disregard such comment would have removed its effect."

On principle, it would seem that errors of this sort, when prejudicial, cannot be cured by the means attempted. In the first place, such an instruction does not effect a cure. One of the purposes of the inhibition is to keep from the jury the opinion of the trial judge on questions of fact which the jury are to determine, and when the opinion of the judge is once made known to the jury, plainly no subsequent instruction can remove from the minds of the jurors the knowledge acquired thereby; at best, such instructions can only mitigate the offense. It is not to be understood, of course, that we here assert that every comment made by the trial judge on a matter of fact in evidence will work a reversal, regardless as to which of the parties may assign it as error. On the contrary, it must be such a comment as can operate to the prejudice of the party assigning it; the rule being that the error complained of, to work reversal, must be in its nature prejudicial. *Miller v. Dumon,* 24 Wash. 648, 64 Pac. 804; *State v. Manderville,* 37 Wash. 365, 79 Pac. 977; *State v. Roberts,* 91 Wash. 560, 158 Pac. 101. In this instance the objectionable comment is in its nature prejudicial; the court commended to the jury the credibility of the witness, who was testifying to matters of fact which were directly at issue.

The fourth and final assignment relates to the instruction of the court to the jury on the question of reasonable doubt. As a part of its instruction on the particular question, the court gave the following:

"A reasonable doubt is such a doubt as exists in the mind of a reasonable man after he has fully, fairly and carefully compared and considered all of the evidence introduced on the trial. If, after a careful consideration and comparison of all of the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt."

At the conclusion of the charge, the defendant requested the court to give an instruction to the effect that a reasonable doubt could arise from a lack of evidence as well as from the evidence given to the jury. The request was refused, and we do not find that it was covered elsewhere in the instructions. The requested instruction should have been given. It announced a correct principle of law which the defendant was entitled to have brought to the attention of the jury.

For the errors indicated, the judgment is reversed and a new trial awarded.

HOLCOMB, C. J., MOUNT, MITCHELL, and BRIDGES, JJ., concur.

[No. 15537. Department Two. December 22, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v. BERNARD S. ANDERSON, *Appellant*.[1]

CRIMINAL LAW (68)—WITHDRAWAL OF PLEA—VACATION OF JUDGMENT. An application to withdraw a plea of guilty is addressed to the sound discretion of the court; but, in view of Rem. Code, §§ 2111, 2181, requiring such motion and motions in arrest to be made before judgment, it can only be entertained after judgment as an application to vacate the judgment; and if for irregularity or fraud, the judgment is entitled to every reasonable intendment in its support, and will be set aside only upon a clear showing and adjudication of a *prima facie* defense on the merits.

Appeal from an order of the superior court for Pacific county, Hewen, J., entered May 3, 1919, denying a motion to vacate a judgment and sentence, after a hearing before the court. Affirmed.

John T. Welsh and *John I. O'Phelan*, for appellant.

Herman Murray, for respondent.

[1]Reported in 186 Pac. 266.

TOLMAN, J.—On April 28, 1919, the appellant was arraigned in the trial court upon an information filed by the prosecuting attorney of Pacific county, charging him with the commission of the crime of bootlegging, as defined by § 17h, p. 60, ch. 19, of the Laws of 1917. The record of the arraignment is as follows:

"And now comes A. B. McDonald, sheriff of Pacific county, Washington, and brings the defendant, Bernard Anderson, to the bar of this court, and comes Herman Murray, Esq., prosecuting attorney for said Pacific county, Washington, and the said Bernard Anderson being brought to the bar of this court and being interrogated by the court if the name by which he in the said information is named be not his true name, says, that his true name is Bernard Anderson, the name by which he is in the said information named, and having been asked by the court as to whether or not he had counsel, and having stated to the court that he had no counsel, and upon being asked by the court as to whether or not he desired counsel to be appointed by the court to act in his behalf, he stated that he did not, whereupon the court informed him, the said Bernard Anderson, that under the charge in the information it was a felony punishable by imprisonment in the state penitentiary at Walla Walla, for not less than one year nor more than five years, and again asked the defendant Bernard Anderson whether or not he desired counsel to represent him, and to which the said defendant Bernard Anderson replied that he desired no counsel to represent him, and the said information being read to the said Bernard Anderson, and it being demanded of him concerning the premises in said information specified whether he be guilty or not guilty thereof, the said defendant, Bernard Anderson, pleads guilty of the crime as charged in the said information, which said plea of guilty as charged in the information is hereby accepted by the court, and the clerk of the court is hereby directed to enter his plea of guilty of record herein."

Following which, on the same day, judgment on the plea of guilty was entered, and appellant sentenced to

the state penitentiary for a term of not less than one nor more than five years. Thereafter, on May 3, 1919, appellant, having procured counsel, moved the court to set aside the conviction, judgment and sentence and to permit him to withdraw his plea of guilty and interpose a plea of not guilty. The motion was verified by appellant, but otherwise unsupported, and recites that appellant did not know and was not advised of the fact that more than one degree of crime might or could be predicated upon the possession of intoxicating liquors; that he did not fully understand the information when read to him; did not have the benefit of counsel; was nervous, excited and frightened and did not realize the seriousness of the charge; admitted that he was informed that the crime charged was a felony punishable by imprisonment in the state penitentiary, and asserted that he was not guilty of a felony. After hearing counsel on both sides, the motion was, on the same day, denied, both on the ground that the court had no jurisdiction to entertain it after judgment, and also because it was without merit in fact.

The questions here presented were before this court in *State v. Scott,* 101 Wash. 199, 172 Pac. 234, where, after a full discussion, it was held that an application to withdraw a plea of guilty is addressed to the sound discretion of the court, and in view of Rem. Code, §§ 2111 and 2181, requiring such motions and motions in arrest of judgment to be made before judgment, such a motion made after judgment will be considered only as an application to vacate the judgment under Rem. Code, § 464 *et seq.,* and if for irregularity or fraud, the judgment is entitled to every reasonable intendment in its support, and will be set aside only upon a clear showing of a *prima facie* defense on the merits.

Applying these principles to the record before us, it is at once apparent that there is no showing of any defense on the merits, beyond the bare verified statement by the appellant that he is not guilty of a felony and believes that a jury would so find.

Viewed in any light, before judgment or after, we find nothing in the motion which would justify us in holding that the trial court abused his discretion or committed error.

The judgment appealed from is affirmed.

HOLCOMB, C. J., FULLERTON, MOUNT, and BRIDGES, JJ., concur.

[No. 15547. Department One. December 22, 1919.]

JAHN & COMPANY, *Respondent*, v. L. A. WRIGHT *et al.*, *Appellants*.[1]

SALES (144)—REMEDIES OF BUYER—RECOVERY OF PRICE. Upon a sale of hay to be measured by the buyer, which measurement was fairly made, the buyer is entitled to recover an advance made on the purchase price, where the sellers were at fault in refusing to deliver unless payment was made upon their measurements and claimed a modification of the contract which was not shown to have been made by a person having authority to make any modification.

Appeal from a judgment of the superior court for Yakima county, Holden, J., entered April 14, 1919, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

F. E. Gordon and *Grady & Shumate*, for appellants.

Roberts & Skeel and *J. J. Geary*, for respondent.

MACKINTOSH, J.—This controversy depends for its determination upon a question of fact, and, in our

[1]Reported in 186 Pac. 262.

opinion, the conclusion reached by the trial court should not be disturbed, as the evidence does not preponderate against it.

On August 12, 1918, the parties entered into a contract for the purchase and sale of a crop of hay grown by the appellants, the contract providing: "this hay we [the respondent] will measure not later than October 25, 1918, and pay for in full at the time of measurement; Frye & Co. rule of measurement." On October 24, the appellants measured the hay and computed the amount as a little in excess of 626 tons. On October 26, the respondent, with the appellants present and assisting, measured the hay and computed the quantity as 578 tons and a fraction. Early in November, the hay was remeasured by disinterested parties secured by the appellants, and that measurement, when computed, showed a tonnage of 624 tons and a fraction. The respondent tendered the amount due according to the measurement taken by it, which was refused, and it then began this action to recover back the $3,000 which had been paid on the contract at the time of its consummation as advance payment. The appellants resisted the claim upon the ground that the hay had not been measured correctly, and that the original contract had been modified, in that an extension of time for payment had been made upon condition that the hay be remeasured by disinterested persons, and set up a counterclaim for damages in the difference between the contract price and the market price at the time of the alleged breach.

The evidence does not warrant the conclusion that there has been any modification of the contract. The person with whom the appellants claim to have entered into the modification agreement is not shown by any evidence to have had any authority to make any modification, if any was attempted to be made. According

to the terms of the contract, the respondent was to purchase the hay upon measurements made by it, and the evidence is satisfactory that such measurement was fairly made, and that the failure to deliver the hay was the fault of the appellants. It would serve no purpose to recite in detail the many facts testified to in regard to the various measurements; but, as above stated, the findings of the trial court are amply supported by the evidence. For that reason, the judgment is affirmed.

HOLCOMB, C. J., PARKER, MITCHELL, and MAIN, JJ., concur.

[No. 15563. Department One. December 22, 1919.]

ROBERT J. McCLURE, *Appellant*, v. CHARLES A. WILSON *et al., Respondents.*[1]

TRIAL (64)—DIRECTION OF VERDICT—OPERATION AND EFFECT OF MOTION. There is no waiver of a jury trial, or conclusive submission of the merits of the case to the judge, where both parties moved for a directed verdict, and both motions were overruled and the case, which was purely a law case, was submitted to the jury; and the jury's verdict is as binding upon the court and parties as in any other case.

MUNICIPAL CORPORATIONS (390, 391)—USE OF STREETS—AUTOMOBILES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. In an action for personal injuries, sustained by a pedestrian when struck by defendant's automobile at a city street intersection, neither the negligence of the defendant nor plaintiff's contributory negligence can be determined as a matter of law, where it appears that plaintiff, after leaving a street car, hurried back across the street to pay the conductor his fare and while in plain view of the defendant, started back to re-cross the street in front of the defendant's automobile which he had last seen about one block away, and defendant drove across the city street intersection without reducing his speed below fifteen miles per hour; as the questions were for the jury.

[1]Reported in 186 Pac. 302.

Appeal from a judgment of the superior court for King county, Frater, J., entered April 22, 1919, in favor of the defendants, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

Paul Shaffrath and *Arthur C. Dresbach,* for appellant.

Morris B. Sachs and *W. R. Crawford,* for respondents.

PARKER, J.—The plaintiff, McClure, commenced this action in the superior court for King county, seeking recovery of damages which he claims to have suffered as a result of the negligent operation of an automobile by the defendant Wilson while driving the same as agent for the defendant Matheny, the owner thereof. A trial upon the merits in the superior court sitting with a jury, resulted in a verdict awarding the plaintiff recovery in the sum of $2,780. Thereafter the court rendered in favor of the defendants a judgment notwithstanding the verdict, upon motion timely made in that behalf by their counsel. From this disposition of the cause, the plaintiff has appealed to this court.

The main question here to be decided is whether or not the trial court erred in refusing to render judgment in favor of appellant in accordance with the verdict, and in rendering the judgment against him notwithstanding the verdict. In view of the contention made by counsel for respondents that the condition of the record is such as to call for the conclusion that the trial court rendered its decision upon the questions of both law and fact, and that it was warranted in so doing as if the case had been tried before the court without a jury, it seems necessary that we first determine the viewpoint the trial judge was re-

quired or permitted to assume in rendering his decision upon the motion for judgment notwithstanding the verdict; that is, whether he was required to dispose of that motion as in any other ordinary jury case where a verdict is rendered, or whether he was, because of prior motions by counsel for the respective parties and the peculiar circumstances of the trial, authorized to dispose of the motion as if he were then deciding the case upon the merits upon questions of both law and fact. If the judge was required to dispose of the motion for judgment notwithstanding the verdict purely as such, having in mind that the verdict of the jury would be controlling unless wrong, as a matter of law, it is plain we must test the correctness of his decision by determining whether or not there is evidence to support the verdict; while if the judge was, by reason of prior motions made by counsel for both parties and the peculiar circumstances of the trial, authorized to dispose of the motion as if he were deciding the case upon the merits as to questions of fact as well as law, it is equally plain we must test the correctness of his decision by determining whether or not the weight of the evidence preponderates against it.

The facts determinative of the correctness of the decision upon this preliminary question may be summarized as follows: At the conclusion of the introduction of all of the evidence upon the trial, both sides having rested, a motion was made in behalf of respondents for an instructed verdict in their favor, rested upon the ground, in substance, that the evidence would not support any finding of negligence on the part of respondents; that appellant's injuries were conclusively proven to be the result of his own contributory negligence; and that, therefore, it should be so decided as a matter of law. This motion was

immediately heard and denied. Immediately thereafter a motion was made in behalf of appellant, as follows: "We ask at this time also for an instructed verdict for the plaintiff, for the reason and upon the ground that the evidence distinctly shows by Mr. Wilson himself that he deliberately, wilfully ran this man down." This motion was also immediately heard and denied. Thereupon the trial judge instructed the jury, submitting to it the question of respondents' negligence and of appellant's contributory negligence, the instructions fully and fairly covering these questions, including a fair statement of the law relative to the burden of proof as to each. Thereupon counsel for the respective parties made their arguments to the jury, and a verdict was returned in favor of appellant, as already noticed.

Counsel for respondents now contend that the motions for directed verdict, made at the close of the evidence by counsel for the respective parties, constituted in effect a consent on the part of each that the trial judge should dispose of the case upon the merits as to questions of both law and fact, and that such consent warranted the judge in so disposing of the motion for judgment notwithstanding the verdict, even after the denial of the motions for directed verdict before the submission of the case to the jury. Counsel invoke what they insist is the general rule that when, at the conclusion of a jury trial, before the submission of the case to the jury, motions for directed verdict are made by counsel upon both sides, such action on their part becomes, in effect, a waiver of trial by the jury, and a consent to the submission of the case to the trial judge to be decided by him upon the merits as to questions of both law and fact, citing our decisions in *Knox v. Fuller,* 23 Wash. 34, 62 Pac. 131; *Easterly v. Mills,* 54 Wash. 356, 103 Pac. 475, 28

L. R. A. (N. S.) 952; *Sevier v. Hopkins,* 101 Wash. 404, 172 Pac. 550.

Had the trial judge taken the case from the jury and decided it upon the merits as to questions of both law and fact at the time of disposing of the motions for instructed verdict, before the submission of the case to the jury, we may concede, for present purposes, that he would have been warranted in so disposing of the case; but we are of the opinion that, since these motions were denied and the judge did, as a matter of fact, submit the case to the jury, fully and fairly submitting to it the questions of respondents' negligence and appellant's contributory negligence, that the disposition of the motions for directed verdict, made before such submission of the case to the jury, is a closed incident in the trial which can have no effect upon the subsequent proceedings therein. This is a law case of the purest kind, no relief being sought other than a money judgment for damages. It is not a question, therefore, of the verdict of the jury being merely advisory, as may occur in an equity case. After the disposition of the motions for directed verdict, the trial judge proceeded in the usual course of the trial of a law action, fully and fairly submitting all the issues in the case to the jury which were proper to be submitted to the jury in such a case. It seems quite clear to us that the jury's verdict was as binding upon the judge in this case as in any other law case, and that we must now test the correctness of his disposition of the motion for judgment notwithstanding the verdict in the same manner as if the prior motions for directed verdict had not been made. That is, in so far as the question here to be decided is concerned, we must wholly ignore the making and disposition of these motions. It follows that we are now called upon to determine, as a matter of law, the questions of whether

or not there was evidence to support the verdict rendered by the jury, and whether or not contributory negligence on the part of appellant preventing his recovery was conclusively proven.

At the time appellant was injured, he was walking upon the paved portion of the roadway for vehicles on Alaska street, on the north side of the street car track, in or very near the intersection of that street with Thirty-eighth avenue southeast, in Seattle. Alaska street runs east and west, while Thirty-eighth avenue crosses it at right angles, running north and south. Appellant lives on the east side of Thirty-eighth avenue, a short distance north of Alaska street. The street car track is approximately fifteen feet from the curb on the north side of Alaska street, which fifteen-foot space is occupied by the paved roadway on the north side of the car track. The portion of Alaska street within the car track and to the south thereof is unimproved, and unused by wheeled vehicles.

Late in the afternoon of the day in question, appellant was going to his home, riding on a street car, proceeding west on Alaska street. When he got on the car it was very much crowded with passengers, and apparently by the direction of the conductor he got on the front platform. He rode there until the car stopped at Thirty-eighth avenue, the car stopping as usual with the front platform near the east line of Thirty-eighth avenue. He then stepped off the front platform on the north side, and proceeded north along the line of the sidewalk on the east side of Thirty-eighth avenue towards his home. When he reached the curb at the northeast corner of the street intersection, he was reminded of the fact that he had not paid his fare to the conductor, who was on the rear platform of the street car. He then started back to the car to pay his fare, the car starting about the same

time. He reached the rear end of the car as it was proceeding across the street intersection, and somewhat hurriedly walked or ran west along the north side of the moving car for a distance of about fifteen feet, and handed his fare to the conductor, who was still on the rear platform. He then turned to his right, which would be to the north or northwest, to go across the roadway to the north side of Alaska street. Just after he had so turned, and reached a point near the center line of the paved roadway some six or seven feet from the car, and evidently while still facing more to the west than to the north or east, he was struck from the rear by the front left corner of the automobile being driven by respondent Wilson, being struck by the front left fender and the left end of the guard or bumper on the front of the automobile, and severely injured. He was struck a blow of such force as to indicate that the automobile was moving at a considerable rate of speed. The speed of the automobile was by various witnesses estimated at from ten to twenty miles per hour. The evidence was, in any event, such that the jury might well have believed that the speed of the automobile was at that time at least fifteen miles per hour, and might also have believed from the testimony of witnesses that the speed of the automobile was twenty-five miles or more per hour just before reaching the street intersection.

Appellant says that, when he started back to the street car from the curb at the northeast corner of the street intersection to pay his fare, he noticed an automobile headed west standing near the north curb of Alaska street, about twenty feet east of Thirty-eighth avenue, and that he looked at that automobile with a view of making sure that it was not going to start west along the roadway across which he was proceeding. He also says he saw the automobile which struck

him, when it was coming from the east while it was about a block away. It seems evident that he could not then know or appreciate with any degree of accuracy the speed at which it was coming. This seems to have been observed by him just before he reached the street car to pay his fare. The evidence is not in harmony as to just how far west appellant was when the automobile struck him, but it seems evident that he was well within the boundaries of the intersection, somewhere between the middle of Thirty-eighth avenue and the west boundary thereof. He says he did not see the oncoming automobile between the time he saw it to the east about a block away and almost at the instant it struck him, and we may assume, as it is claimed, that he did not look during that period to the east to observe the oncoming automobile, seemingly resting in the belief that it would in no event reach him before he would pay his fare and get back across the roadway to the north on his way home. The evidence was sufficient, we are quite convinced, to have warranted the jury in believing that the automobile did not, upon its approach to the street intersection and while it was crossing the street intersection, decrease its speed below fifteen miles per hour. Wilson, the driver of the automobile, when at a considerable distance before reaching the intersection, plainly saw appellant and his actions, saw appellant hurry across the roadway and alongside the street car for some little distance and hand the conductor something, during which time it must have been apparent to Wilson that appellant was facing west, with his back to the east, intent on giving something to the conductor on the platform, and as the jury, we think, might well believe, such situation would have caused Wilson to anticipate that appellant intended to, immediately after handing the something to the conductor, again

cross the roadway to the north. We think the evidence was such as to warrant the jury in believing the facts and drawing inferences therefrom as above summarized. We do not say that, were we the triers of the facts, we would necessarily arrive at these same conclusions. We only say that the jury could reasonably do so, and that is as far as we are permitted to go.

We conclude, then, in view of the fact that this unfortunate accident occurred at a public street crossing where it was just as much the duty of Wilson, the driver of the automobile, to look out for appellant, a pedestrian, as it was for appellant to look out for the automobile; in view of the speed at which the jury might believe the automobile was running, both immediately before and at the time of the accident; in view of the situation in which appellant was at the time, his necessary haste, his seeming confidence, well founded, as the jury might well believe, that the oncoming automobile would in no event reach him before he would be back across the roadway to the north, that neither the question of respondents' negligence nor appellant's contributory negligence could be determined as a matter of law, but that both, under all the circumstances, were for the jury to determine. Our decisions in the following cases, we think, support this conclusion: *Hull v. Seattle, Renton & Southern R. Co.*, 60 Wash. 162, 110 Pac. 804; *Richmond v. Tacoma R. & Power Co.*, 67 Wash. 444, 122 Pac. 351; *Davies v. Rose-Marshall Coal Co.*, 74 Wash. 565, 134 Pac. 180; *Lautenschlager v. Seattle*, 77 Wash. 12, 137 Pac. 323; *Fobes Supply Co. v. Kendrick*, 88 Wash. 284, 152 Pac. 1028; *Hines v. Chicago, Milwaukee & St. Paul R. Co.*, 105 Wash. 178, 177 Pac. 795.

We are of the opinion that the judgment notwithstanding the verdict, rendered in favor of respondents, must be reversed, and the case remanded to the supe-

rior court with directions to enter its judgment in favor of appellant, awarding him recovery as found by the verdict of the jury.

It is so ordered.

HOLCOMB, C. J., MACKINTOSH, MITCHELL, and MAIN, JJ., concur.

[No. 15619. *En Banc.* December 29, 1919.]

THE STATE OF WASHINGTON, *on the Relation of J. B. McMillan, as County Commissioner of Whatcom County, Respondent,* v. J. C. HILLS, *as Engineer of Whatcom County, Appellant.*[1]

HIGHWAYS (39)—LOCAL ASSESSMENTS—BENEFITS—APPORTIONMENT—STATUTES—CONSTRUCTION. The provision in Rem. Code, § 5339, as amended by Laws of 1917, p. 242, § 5, that one-half of the benefits of road improvements shall be assessed against the county and one-fourth against the road district or township is not affected by the fact that § 5761, providing for payments in installments, was amended by Laws of 1919, p. 251, § 1, without reference to its prior amendment in 1917; since the amendment in 1919 merely added an exception as to the time for payment of assessments of $25 or less, in nowise altering the method of ascertaining the benefits.

SAME. The amendment of Rem. Code, § 5761, by Laws of 1919, p. 230, § 1, which provides for payment in installments of the tax levied upon the "property assessed" for county road improvements, applies to the proportion to be paid by counties and road districts as well as to assessments on private property; but, in view of the whole act, the language may be construed as mandatory to grant the maximum period on installments apportioned to individuals, and discretionary as to the maximum time for payment of benefits apportioned to the county and road districts.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered September 24, 1919, upon findings in favor of the plaintiff, in man-

[1]Reported in 186 Pac. 295.

damus proceedings to compel a county engineer to proceed with highway improvements. Affirmed.

C. E. Abrams, for appellant.

Loomis Baldrey and *Frank W. Radley,* for respondent.

Teal, Minor & Winfree, amici curiae.

HOLCOMB, C. J.—The court below, after a due hearing upon proper proceedings, on September 24, 1919, granted a peremptory writ of mandate, directing the appellant, as county engineer, to proceed with the engineering work in connection with the road improvement mentioned in the petition of the relator and to perform in all ways the duties required of him by the resolutions adopted by the board of county commissioners on file in these proceedings, from which judgment the engineer appeals.

Appellant, as county engineer, had refused to proceed under two resolutions by the board of county commissioners providing for highway improvements, made upon petition after due hearing, the first on May 28, 1919, designated as highway No. 25, and the second on August 8, 1919, and after the amendment of 1919 was effective, designated as highway No. 26.

The petitions for these improvements were in accordance with the so-called "Donohue Road Law" of 1893, and the amendments thereto by the legislature of 1917 (Laws 1917, p. 238, ch. 72), as to highway No. 25, and the amendments of 1917 and also of 1919 (Laws 1919, p. 230, ch. 95), as to highway No. 26, and called for the improvements to be paid for in not to exceed twenty annual installments, which, at least as to highway No. 26, were in excess of the number of annual installments allowed by law.

It was the contention of appellant, in his refusal to proceed under the resolutions, and on this appeal, that "Chapter 95 of the Session Laws of 1919 so amended Sec. 5761 (Rem. & Bal. Code, as amended by chap. 72, sec. 17, Laws 1917 [p. 251]), that it will be impossible to divide the costs of the improvement chargeable to the county and the townships into annual installments, as the only provision for installments under the section as it now stands is for the assessments against property within the improvement district." This involves the construction of the amendatory acts, and it is stipulated that seventeen other counties of the state and a large number of pending contracts for road improvements are affected and a speedy determination is desired.

The case, however, does not involve any of the questions as to the status of Whatcom (and other) county bonds, as urged by counsel appearing as *amici curiae*, and insisting upon a determination thereof herein. Such questions will not be decided until met with in a proper case.

Whatcom county has township organization, and the resolutions of the board of county commissioners apportioned the estimated costs in ten annual installments for the improvement district and in five annual installments for the county and townships.

The trial judge very ably and accurately summarized and analyzed the legislation in question (excepting part) as follows:

"Under section 5 of chapter 72, Laws of 1917, p. 242, amending section 5739 of Remington & Ballinger's Code, it is made the duty of the county commissioners to appoint appraisers whose duty it shall be to assess the benefits of the improvement to the corporations, companies, persons and property particularly benefited by the same. These appraisers are required, under

the same section, to prepare a schedule, which shall set forth:

"First—The benefits assessed to the county for such improvement, which shall be one-half of the whole estimated cost thereof.

"Second—The benefits assessed to each road district or township through or into which the improvement is located, which assessment shall be equal upon all the assessed property in the road district or township according to the value thereof as shall appear upon the duplicate assessment roll of the county at the time, and which benefits shall be one-fourth of the whole estimated cost of the improvement within the boundary of the road district or township, and

"Third—The benefits assessed to the lots and lands lying within the proposed improvement boundary, et cetera.

"The same chapter 72 amended section 5761, Remington & Ballinger's Code, so as to provide for the payment of such improvement by annual installments by an annual tax levied upon the property assessed for the benefits in proportion to the benefits assessed, whenever the petition for the improvement shall so request.

"This section further provides that the petition shall set forth that the improvement shall be paid for by installments, and provides that the number of years shall be not more than twenty. In such case it is provided that the portion of the expense to be borne by the county, townships or road districts shall be levied and collected as other taxes, after the awarding of the contract, 'provided that the board of county commissioners shall, if the petitioners so request, arrange that the portion of the expense to be borne by the road districts or townships be paid in not to exceed five annual installments, and the board may in its discretion provide that the portion of the expense to be borne by the county be paid in not to exceed five annual installments, and shall divide that portion of the expense to be borne by the county, road district or townships, and also the lots and land lying within the proposed improvement boundaries and found to be

specially benefited, into as many equal parts as there are installments, and shall each year, when an installment is payable, extend the amount of the same, together with interest on the deferred payments at the rate of six percentum per annum, upon the duplicate assessment roll against the persons and property assessed for benefits,' et cetera.

"Chapter 95 of the act of 1919, entitled 'An Act Relative to Payment of Highway Assessments' and amending the said section 5761 of Remington & Ballinger's Code, consists of but one section. This section is in the exact language of the original section 5761, except that it contains, as an addition thereto, a provision to the effect that 'in the event that the entire assessment upon any single tract or parcel of land, or contiguous tracts or groups of tracts belonging to the same owner is $25 or less, such assessment shall become due and payable at the time the first general taxes next after the date of the levy shall become due, and the terms of this act relating to the payment of assessments in installments shall not apply to such assessments.'

"The section of the act, chapter 95, Laws of 1919. except the addition thereto respecting the payment of assessments of $25 or less, is as follows:

" 'When the petition shall so request, the improvements provided for under this chapter shall be paid for in annual installments by an annual tax levied upon the property assessed for benefits. The petition shall set forth 'that the improvement be paid for on the —— years installment plan,' and the number of years shall be not more than ten. When the improvement is done under the provisions of this section, the clerk of the board of county commissioners shall divide the total estimated cost of the improvement, including interest on deferred payments, into as many equal parts as there are installments, and shall each year when an installment is payable, enter the amount of the same upon the duplicate assessment roll against the persons and property assessed for benefits, and it shall be the duty of the county treasurer to collect the same the same as other taxes are collected.'

"It will thus be seen that while the petition is for an improvement to be paid for in annual installments, and the estimated cost of the improvement shall be divided into as many equal parts as there are installments, and that the amount of the same shall be entered upon the duplicate assessment roll of the county against the persons and property assessed for benefits, no express provision is made whereby the county commissioners may arrange for the payment of the portion to be borne by the county, road district, or townships in annual installments.

"It has been suggested that it is probable that the legislature intended to amend the law relating to the subject of payments of such improvements by adding thereto the provision respecting assessments for $25 or less, but that, through some oversight or inadvertence, the original section was in fact amended instead of the amended section of 1917. But chapter 95 is fair on its face and unambiguous, and the court in such case may not inquire into the history of this legislation.

"While the decisions are not uniform, the rule respecting construction of amendments is that, where a section of an original act has been amended, the amendment superseding the original section, a subsequent statute amending the original section by number, but not amending the section as amended, supersedes and repeals the amendatory law. 36 Cyc. 1055-1060, and cases cited; *Fletcher v. Prather,* 102 Cal. 413, 36 Pac. 658; *West & Co. v. Board of Com'rs of Latah County,* 14 Idaho 353, 94 Pac. 445; *Whitfield v. Davies,* 78 Wash. 256, 138 Pac. 883.

"It follows that the amendatory act of 1919 supersedes the amendment of 1917, and is the law.

"The amendment of 1919, as has been seen, does not contain any express language providing that road districts, townships or counties shall be empowered to arrange for the payment of the portion to be paid by such municipalities in annual installments, as did the amendment of 1917.

"But the section as amended does provide that when the petitions shall so request, the improvement 'shall be paid for in annual installments by an annual

tax levied upon the property assessed for benefits,' and it has been seen that the schedule shall include three different units or political subdivisions, which are declared by the legislature to be subjects of benefits, viz.: the county, road districts or townships, and the private lands within the improvement boundary.

"As has been seen, section 5739, Remington & Ballinger's Code, as amended by the act of 1917, provides that the appraisers appointed by the county commissioners to assess the benefits of such proposed improvements to the corporations, companies, persons and property particularly benefited thereby shall prepare a schedule which shall set forth:

"First—The benefits assessed to the county.

"Second—The benefits assessed to each road district or township through or into which the improvement is located.

"Third—The benefits assessed to the private lots and lands lying within the proposed improvement boundary.

"It will thus be seen that the legislature has determined in advance that counties, road districts or townships will be benefited as follows:

"The county, at least one-half of the cost of the improvement, and each road district or township, one-fourth of the cost of the same. This may be legally done. *Board of Com'rs of Monroe County v. Harrell,* 147 Ind. 500, 46 N. E. 124, and cases cited.

"This being the scheme for such improvement in force at the time of the amendment of 1919, the language of the latter must be read and interpreted in connection with the other provisions of the law providing a plan for local improvements to be paid for by assessments.

"The act of 1919, it has been seen, declares that when the petition shall so request, the improvement shall be paid for in annual installments by an annual tax levied upon the property assessed for benefits, and also the petition shall set forth that the improvement be paid for on the —— years installment plan, and the number of years shall not be more than ten.

"This act further provides that, when the improvement is done under the provisions of this section, the clerk of the board of county commissioners shall divide the total estimated cost of the improvement into as many equal parts as there are installments, and each year when an installment is payable, enter the amount of the same upon the assessment roll against the persons and property assessed for benefits, and it is made the duty of the county treasurer to collect the same as other taxes are collected.

"The whole context considered, it would appear that persons and property assessed for benefits, as those words appear in chapter 95, include all the persons and municipalities which are by section 5739 included in the schedule setting forth the benefits assessed and against whom assessed. Otherwise the amendment of 1919, which undertakes to provide for payment for such improvements in annual installments, would be of no force and virtue and only the cash payment plan for such improvements, provided for by section 5760, Remington & Ballinger's Code, would for practical purposes remain.

"It could not well be contended that the private property benefited by any such improvement should be made to bear the whole cost of the same, since section 5 of chapter 72 of the act of 1917, amending section 5739, Remington & Ballinger's Code, makes it the duty of the appraisers to schedule the benefits against counties and road districts or townships to the extent of one-half and one-fourth, respectively, of the cost of the improvement and finds the benefits to such political subdivisions to be in those proportions to the whole cost of the same.

"Section 5 of chapter 72, amending the act of 1917, p. 242, requiring that the appraisers shall prepare a schedule which shall set forth, as has been seen, the benefits assessed to the county, road districts or townships and the private property within the same, and finding that the benefits are as in that section enumerated, it may be argued that the legislature has provided three taxing districts which shall contribute to the cost of each road improvement made under the

road law in question, viz.: one, co-extensive with the county but limited in the aggregate of all such improvements to four mills in any one year by section 5765, as amended by the act of 1917, a second embracing the road districts or townships through and into which the improvement is located, and a third composed of the private property lying within the proposed improvement boundary, and as to each the payments shall be annually, not more than ten in number and of equal installments, exclusive of interest, and section 5762, Remington & Ballinger's Code, as amended, provides for a special road improvement fund in such cases.

"The whole of the law on the subject considered, the court cannot believe that, by chapter 95 of the Laws of 1919, the legislature intended either to impose the whole of the cost of any road improvement to be paid for by assessment upon the private property in each district, or that the plan for any such improvement should be limited to the cash plan. If so, section 5739 of the code, as amended by the Laws of 1917, it appears to the court, would have been changed and a different scheme for such improvements provided.

"Chapter 95 of the acts of 1919 must be construed as herein construed, or else construed out of existence, in so far as it pertains to payment for improvements by installments. It must further be construed as herein construed or else be given the effect of amending the whole plan and scheme for roadway improvements and, as well, the apportionment of the cost thereof as provided in section 5739, Remington & Ballinger's Code, as amended by the acts of 1917. Not believing that the legislature had any such intention in enacting chapter 95, and that no intention of revolutionizing the road law was in the minds of those composing that body, but that the intention was to continue the existing plan in force, with a limitation upon assessments of $25 or less against any single tract or contiguous tracts belonging to the same owner, it follows that the writ should be granted."

The opinion of the trial judge very logically sets forth the successive amendments and the probable purpose of the amendment of 1919, which is the basis of all contention.

The amendatory act of 1917 (Laws 1917, ch. 72, p. 238), was quite comprehensive. The amendment of 1919 (Laws 1919, ch. 95, p. 230), in nowise altered the scheme of procedure or the method of ascertaining the benefits conferred, respectively, upon the county, road districts or townships affected, and the land within the improvement district "particularly benefited," except as to the length of time of payment and division into annual installments and the requirement that assessments on tracts affected belonging to the same owner amounting to $25 or less should be collectible with the next annual taxes.

Appellant asserts that the words "property assessed for benefits" means only that property referred to in § 1, ch. 72, Laws of 1917, p. 238, as including the "property particularly benefited, or lands lying within two miles of either side of the center line of the improvement, and all road districts or townships which will be subject to assessment for the improvement."

Why exclude the county? In the same act it is clear that the county was legislatively declared to be assessable for the benefits, for by § 5739, subd. 1, Rem. & Bal. Code, it was provided that "The benefits assessed to the county for such improvement shall be one-half of the whole estimated cost thereof." In other words, as to the political subdivisions affected by the proposed improvement, the legislature, in its sovereign taxing capacity, fixed and apportioned the benefits and the resultant assessments to them. It is not and cannot be doubted that the legislature had such power. When, then, we find the legislature amending

the law by reenacting and amending the original § 5761, Rem. & Bal. Code, and no other provision, we must assume that it still had the same thing in mind, that the county was one of the political subdivisions to be assessed for benefits and in the same proportion as before. No other construction is possible.

Coming now to the specific effect of the amendment of 1919, it is evident that the effect thereof is not that the county's apportionment must be paid in cash in full when the first annual installment of assessments is due or before, but that the county and townships shall have the same maximum period and proportional installments as the owners in the particular improvement district for the cost of the highway. Under the law as it was theretofore, the owners of lands particularly benefited and within the improvement district had a maximum of twenty years' time and twenty installments, and the county and townships only five years' maximum period, when the petition initiating the improvement so prayed. Now, as the 1919 amendment provides:

"When the petition shall so request, the improvements . . . shall be paid for in annual installments by an annual tax levied upon the property assessed for the benefits. The petition shall set forth 'that the improvement be paid for on the —— years installment plan,' and the number of years shall not be more than ten," etc., etc. Laws 1919, p. 230, § 1.

The language is clear and could not be more specific or positive. When the petition prays for the improvement to be paid by installments for a period of not to exceed ten years, it must be so done, if done at all. There is room only for argument as to whether the county and township should not, under these provisions, be bound to the same maximum period and proportional installments as those of the owners par-

ticularly benefited, namely, the —— years installment plan petitioned for, not exceeding ten. But it is reasonable to construe the language as being mandatory upon the county commissioners to grant the maximum period, not exceeding ten years, and apportion the payment in installments accordingly to the persons particularly benefited, but discretionary as to the maximum time, not exceeding ten years, for payment of the benefits apportioned to the county and townships as the condition of their finances may justify. The general burden of cost of such improvements at any given time might be so slight that for a particular improvement petitioned for it might be desirable to pay at once or within one year, or two; or the burden from such improvements at a given time might be such that it would be necessary to extend the period for a much greater period, up to ten years. This, we conclude, the legislature left, within the limits mentioned, to the discretion of the county board.

The judgment is affirmed.

ALL CONCUR.

[No. 15300. Department One. December 30, 1919.]

DONALD SMITH, *Respondent*, v. GEORGE BROWN, *Appellant*.[1]

JOINT ADVENTURES—MUTUAL LIABILITIES—DIVISION OF PROFITS—JUDGMENT. In an action on a contract between two promoters of a corporation whereby each was entitled to one-half of the net profits of the enterprise, plaintiff is not entitled to recover a money judgment on proof that defendant had received a certain amount of stock in the company, which was worth less than par, in the absence of any proof of the value of the stock; and the judgment should be for fifty per cent of the net amount of stock received as admitted in the answer.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered December 14, 1918, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Modified.

Cassius E. Gates, for appellant.

Winter S. Martin and *A. C. Hough*, for respondent.

HOLCOMB, C. J.—In October, 1917, appellant, Brown, learned of what he considered a favorable opportunity in the fishing industry at Clayoquot Sound, B. C. At that time he had an office in the Pantages Building in Seattle. This office adjoined that of respondent, Smith, who was engaged in business-brokerage. It is not clear from the record whether Brown approached Smith or whether the opposite was true, but nevertheless they soon began to discuss the proposition Brown had in mind. The record discloses that Smith was apprised that the proposition would involve an investment of at least fifty or sixty thousand dollars, and he agreed to obtain for Brown subscribers to the capital stock of the company proposed to be formed. It is difficult from the record to say that Smith agreed

[1]Reported in 186 Pac. 298.

to obtain the full amount of subscriptions. The evidence shows that it was agreed between them that they should divide equally whatever profit Brown made in promoting and organizing the corporation.

Smith proceeded to introduce Brown to one Dr. Campbell, who subscribed for three thousand shares of the stock, and through Dr. Campbell other subscriptions to the extent of $12,000 were obtained. Brown, of his own initiative, secured $20,000 of additional subscriptions, making a total of $35,000 cash which was subscribed for stock in the company. Smith made some representations that he would himself subscribe for $6,000 par value of stock, but this he never did. He did, at a meeting of prospective Seattle subscribers, address them urging them to invest in the proposition, but beyond what has been related, there is little evidence that he aided Brown in his efforts to get the corporation going.

The corporation was organized with a capital stock of 250,000 shares, of the par value of $250,000. It is not clear from the record how much actual cash was received from stock subscriptions, although it is certain it was much less than $50,000. A total subscription of stock to the extent of about $80,000 was obtained, many of the fishermen who took stock turning in their boats and other fishing apparatus in payment therefor. After the corporation was organized, at a meeting of directors, the sum of $15,000 was voted to Brown for his efforts in promoting and organizing the corporation. We cannot escape the conviction that this $15,000 was voted him with the understanding that he would take it, not in cash, but in stock of the corporation, which he immediately did. Of this $15,000 of stock, Brown paid out various portions as commissions, so that, as a net profit for promoting and organizing the corporation, he realized $8,000 par value in

stock of the corporation. There is little evidence as to the real worth of this stock, but the corporation was embarrassed for funds and lost much of its property through sheriff's sale, so that it would seem the stock was of a value far below par.

A trial of the case before the court sitting without a jury, resulted in findings in favor of plaintiff, upon which the court entered a money judgment against the defendant for $3,500.

It is the contention of appellant that the trial court erred in finding upon a *quantum meruit* when the plaintiff had declared upon an express contract. However that may be, there is no evidence in the record of the value in money of respondent's services, nor is there any evidence that, at the time of the alleged breach by appellant, the stock that respondent should have received was of the value of $3,500, or any other sum. If there was any meeting of the minds shown, it was an agreement to divide the net proceeds received by Brown. These net proceeds, according to appellant's own statement, were in stock of the corporation in the amount of $8,000. Respondent claims, "By the terms of the agreement, if George Brown had received cash money for his promotion services, respondent would have been entitled to one-half of the amount received." True. But respondent further asserts, "as the proof developed, Brown received stock instead of money. He was therefore required to tender one-half of the stock, and failing to do so, subjected himself to a payment of this amount of money." This is utterly fallacious. If he had breached the agreement at that time by failing to tender one-half of the amount received, then, in order for respondent to recover upon a *quantum meruit,* it was necessary that he show what the value of the stock was at that time. In this he utterly failed. In view of this, there

was nothing for the court to do but to divide the proceeds, which was only stock of the corporation. It is true that Smith did not obtain all of the subscriptions to the capital stock of the corporation, nor did he obtain fifty thousand dollars' worth, but it does not appear from the record that his contract with appellant called for his doing either of these things. He did secure subscriptions at a time when it was most difficult to interest subscribers in this particular investment, and it would seem that he fully performed.

The lower court gave respondent a money judgment for $3,500. In view of a lack of evidence as to the value of fifty per cent of appellant's net profit, a more correct result would have been reached if the court had awarded the respondent fifty per cent of the net amount of stock received by appellant, or $4,000, face value, of the stock, as admitted in his answer.

The judgment is therefore modified, awarding to respondent stock of the corporation received and held by appellant in the amount of $4,000, face value.

Appellant will recover costs of this appeal.

Parker, Mackintosh, Mitchell, and Main, JJ., concur.

[No. 15393. Department Two. December 30, 1919.]

LAURA FISHER, *Respondent*, v. THE CITY OF ANACORTES, *Appellant*.[1]

DAMAGES (98)—PLEADING—GENERAL OR SPECIAL DAMAGES. In an action for personal injuries, plaintiff cannot be required to set out or specially plead the amount of damages claimed for pain and suffering already endured, and the amount that will be sustained in the future, but can recover therefor under the general allegation of damages.

MUNICIPAL CORPORATIONS (442)—DEFECTIVE SIDEWALK—CONTRIBUTORY NEGLIGENCE. The contributory negligence of one who was tripped by the sinking of a plank in a sidewalk is a question for the jury, although plaintiff knew the walk was dangerous, where it was much used by the public and she had no knowledge of the particular defect that caused the fall; the law only requiring due care under the circumstances.

SAME (435) — DEFECTIVE SIDEWALK — CITY'S NOTICE OF DEFECT. Whether a city had notice that a plank in a sidewalk would sink and trip a pedestrian is a question for the jury, where the walk had been down for eleven years, the boards were decayed and loose and the condition had existed for a considerable period of time.

DAMAGES (108)—EVIDENCE—EXPECTANCY OF LIFE. Mortuary tables are admissible in an action for personal injuries where plaintiff had not fully recovered thirteen months after the accident and it would seem that her injuries would be permanent.

APPEAL (449) — REVIEW — HARMLESS ERROR — ADMISSION OF EVIDENCE. Admission of mortuary tables in an action for personal injuries is harmless error, even if the injuries were not permanent.

Appeal from a judgment of the superior court for Skagit county, Brawley, J., entered March 3, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained through a fall on a defective sidewalk. Affirmed.

Ben Driftmier, for appellant.

Joiner & English, for respondent.

[1]Reported in 186 Pac. 271.

FULLERTON, J.—The respondent was injured by a fall upon the sidewalk of the appellant city, and in this action recovered in damages against the city in the sum of $950. The city appeals, assigning that the court erred, (1) in denying its motion to require the complaint to be made more definite and certain; (2) in denying its motion for a nonsuit; (3) in admitting certain evidence; and (4) in entering a judgment upon the verdict of the jury.

In her complaint, after setting forth the nature of the injuries she received from the fall, the respondent alleged that, "by reason of the pain and suffering she has endured as result of said injuries, and the inconvenience, weakness and pain she still endures and which she is reasonably certain to suffer in the future, she has been damaged in the sum of $2,500." The city, on its first appearance in the cause, moved that the respondent be required to make this allegation of her complaint more definite and certain by "setting out the items going to make up the sum claimed, that is, that she set out the amount of damages resulting from the pain and suffering which she has endured as a result of said injuries, that she set out the amount of damages resulting from the inconvenience, weakness and pain she still endures, and the amount of damages she will suffer in the future, and what the damages are." The court denied the motion, and its action in so doing furnishes the foundation for the first error assigned.

There was no error in the ruling of the court. Under the general allegation of damages a plaintiff is entitled to recover all of the natural and necessary damages that flow from a given injury, and no rule of law or precedent requires that they be specially pleaded, or that the amount suffered from each natural and necessary result be separately stated. In this state

even the general allegation of the amount claimed is more of form than of substance. We have held it reversible error for a nonexpert witness, even though the witness be the injured party, to state in dollars and cents the amount of the damages suffered. *DeWald v. Ingle,* 31 Wash. 616, 72 Pac. 469, 96 Am. St. 927. So here, had the respondent been required to segregate her damages, as the appellant requested, her testimony could not have been different than it actually was. She could but have described the injury and its consequent results to her person, and left it to the jury to say what sum of money would compensate her for her injuries and sufferings. To have segregated the items would, therefore, have been confusing rather than enlightening, and pleadings are intended to promote the latter, not the former result.

The motion for nonsuit was based on two contentions: first, that the respondent was guilty of contributory negligence; and second, that her evidence failed to show that the appellant had actual knowledge of the defect in the walk causing the injury, or could, by reasonable diligence, have discovered the same prior to the injury.

The respondent's fall was caused by the sinking of the board in the walk on which she stepped, permitting the toes of her foot to catch under the next succeeding board. She testified that she had traveled over the walk many times and knew that it was not in the best of condition; that it was uneven and in places lower on the one side than the other, but that she had not discovered that any particular board would sink below the surrounding boards when stepped upon. She further testified that the walk was the only walk on the street at that place, that it was on one of the principal streets of the appellant city, and a walk

much used by the public generally. Under these circumstances, the question of contributory negligence was for the jury. The mere fact that a pedestrian is aware of a defective condition of a public walk and uses it having such knowledge, is not in itself conclusive of negligence on the user's part, although it is competent evidence on the question of contributory negligence. All that the law requires under such circumstances is that the user exercise such care and caution as a person of ordinary prudence would use under like or similar circumstances. *McQuillan v. Seattle,* 10 Wash. 464, 38 Pac. 1119, 45 Am. St. 799; *Stock v. Tacoma,* 53 Wash. 226, 101 Pac. 830. There is nothing in the record which conclusively shows that the respondent was not in this instance exercising the proper degree of care.

The question suggested by the second branch of the question was likewise for the jury. It was in evidence that the walk had been down for more than eleven years; that, at the place of the accident, and at other places in the immediate vicinity, the stringers had rotted away, and that the ends of certain of the boards were decayed; that boards in the walk were loose; that the walk was uneven; that there was a hole in the walk at or near the place of the accident; and that these conditions had existed for a considerable period of time. As we said in *Billings v. Snohomish,* 51 Wash. 135, 98 Pac. 107:

"The city officers must exercise reasonable diligence in the care of the city's walks. They must take notice that constant use will gradually wear out a walk; that nails will pull and supports decay; and that at best the life of a wooden sidewalk is limited to but a few years. It is not enough that they may find that the surface of the walk appears sound. The walk as an entirety must be examined and kept in repair if the city is to escape the charge of negligence."

There was, therefore, no error in the refusal of the court to grant the motion for nonsuit.

The court admitted in evidence a mortuary table showing the expectancy of life of a person of the age of the respondent, and this constitutes the erroneous admission of evidence forming the groundwork for the third assignment. There was no evidence that the respondent's injuries were permanent, other than the inference arising from her testimony to the effect that she had not fully recovered at the time of the trial, some thirteen months after the injury was received. It would seem that, from this circumstance, the respondent had the right to contend that her injuries were of a permanent nature, and, if so, the mortuary table was plainly admissible. But if the rule be otherwise, the admission of the table was harmless. In itself it had no probative value; that is, it conveys no information that is not the common knowledge of mankind. As evidence, it stands on the plane of a calendar, an almanac or a report of the weather bureau; it is but a convenient reminder of facts which the human mind cannot always bring to remembrance.

The final assignment of error requires no special consideration. It is founded rather upon the other claims of error than upon anything inherent in itself. Manifestly, if there is no error preceding the verdict, there is no error in entering judgment in conformity with the verdict.

The judgment is affirmed.

HOLCOMB, C. J., MOUNT, TOLMAN, and BRIDGES, JJ., concur.

[No. 15483. Department Two. December 30, 1919.]

THE STATE OF WASHINGTON, *on the Relation of the Port of Seattle, Appellant,* v. WM. A. GAINES, *as Treasurer of King County, Respondent.*[1]

COUNTIES (31, 70)—GENERAL FUNDS—DEPOSIT BY COUNTY TREASURER—INTEREST ON PUBLIC MONEYS. Under Rem. Code, § 5072, requiring county treasurers to deposit all public funds in a county depositary, and § 5074, requiring interest received thereon to be credited to the county expense fund, the interest on funds of a port district belongs to the county, the county treasurer being required by Laws of 1917, p. 503, to handle port district funds without any compensation to the county other than the interest received thereon.

SAME. Rem. Code, § 5075, referring to the quarterly settlements for "any county moneys" deposited by county treasurers, was not intended to restrict the right of county treasurers to deposit strictly county funds, in view of all the other provisions of the act requiring the deposit of all public funds.

SAME. The legislature, in providing by Laws of 1917, p. 503, that all port district funds shall be paid to the county treasurer, must have had in mind the depositary act, Rem. Code, § 5072, requiring the county treasurer to deposit all public moneys in his hands in a depositary bank.

Appeal from a judgment of the superior court for King county, Frater, J., entered June 14, 1919, upon sustaining a demurrer to the complaint, dismissing an action for a writ of mandamus. Affirmed.

Preston, Thorgrimson & Turner, for appellant.

Fred C. Brown and *Howard A. Hanson* (*Reeves Aylmore, Jr.,* of counsel), for respondent.

BRIDGES, J.—This is a mandamus action, instituted by the Port of Seattle for the purpose of requiring the treasurer of King county to pay over to the relator certain sums of money which the respondent had collected as interest, resulting from the deposit by him

[1]Reported in 186 Pac. 257.

of certain port district money in certain depositary banks designated by him. The affidavit and complaint alleged that, at all times since January 1, 1919, the respondent had in his hands, as county treasurer, in excess of $200,000 belonging to the relator, which money the respondent had deposited in various banks, and had received interest on such deposits in the sum of more than $300; that the relator is entitled to have this interest credited to its account; that the respondent has refused to give such credit or to pay such moneys to the relator, because the same belong to the county expense fund of King county. To this complaint the respondent interposed a demurrer, which the court sustained. Relator refused to further plead, and judgment was entered dismissing the action, from which judgment this appeal is taken.

The respondent claims that the interest collected by him belongs to the county expense fund by virtue of the county depositary act of 1907. The act authorizing the creation of port districts provides:

"That all funds of the port district shall be paid to the county treasurer, and all disbursements shall be made by such officer on warrants drawn by the county auditor upon order of or vouchers approved by the port commission." Laws of 1917, p. 503.

Section 1 of the county depositary act (Laws 1907, p. 74, § 1; Rem. Code, § 5072 *et seq.*) provides that,

"Each county treasurer of this state shall on the first day of July, 1907, and annually on the second Monday in January thereafter, and at such other times as he may deem necessary, designate one or more banks in the state as depositary or depositaries of all public funds held and required to be kept by him as such treasurer. . . . No county treasurer shall deposit public money in banks except as herein provided."

Section 2 (Id., § 5073), of the act provides that, before any such designation shall become effectual, the bank or banks so designated shall, within ten days after such designation, file with the county clerk a surety bond in the maximum amount of deposits so designated, or provide such other security as shall be approved. Section 3 (Id., § 5074), provides that,

"Before any such designation or designations shall become effectual and entitle said treasurer to make deposits as hereinabove provided, the bank or banks so designated shall also enter into a written contract with the county whose treasurer is to make such deposits, to pay to said county, to be credited to the county expense fund thereof, two per centum per annum on the average daily balances of all moneys so deposited by such county treasurer in said bank while acting as such depositary."

Section 4 (Id., § 5075), provides that,

"The county treasurer shall deposit with any depositary or depositaries which have fully complied with all requirements any county moneys in his hands or under his official control, and for the purpose of making the quarterly settlement and counting the funds in the hands of the treasurer any such sums so on deposit shall be deemed to be in the county treasury."

The appellant bases its contention chiefly on section four of the depositary act, and contends that the county treasurer had a right and is obligated to deposit in the depositary banks only "county moneys in his hands or under his official control," and that, since the port moneys are, of course, not county moneys, the treasurer was under no obligation to deposit such money in the various depositaries designated by him, and that if he did so it was a voluntary act on his part and the interest derived by him therefrom belonged to the port district. Such a construction of § 4 would be out of harmony with the remainder of the

depositary act, because § 1 thereof provides that the county treasurer shall deposit "all public funds held and required to be kept by him as such treasurer," and § 3 expressly provides that the depositaries shall enter into a written agreement with the county agreeing to pay to said county, "to be credited to the county expense fund thereof," two per cent per annum on the daily balance of all moneys so deposited. To give the act the construction contended for by the appellant would require us to hold that the expression "all public funds held and required to be kept by him as such treasurer," found in § 1 of the act and expressly referred to in §§ 2 and 3, means only strictly county money, and did not include other public funds which the law requires him to hold, such as port, city, school, road district and diking district moneys. Such a construction would be contrary to the spirit of the act and would place county treasurers in a very awkward and embarrassing position, because they would not be authorized to deposit any port, school, city or other like public money held by them, in their depositaries, and they could not place such moneys in any bank not a depositary, because the last paragraph of § 1 provides that "no county treasurer shall deposit any public money in banks except as herein provided." If they cannot bank under the terms of this act they cannot bank at all.

The appellant contends that § 4 of the act does not pretend to designate what moneys shall be deposited by the county treasurer in the various depositaries, but merely provides that, when the treasurer makes his quarterly settlement with the county, it shall not be necessary to actually count the funds, but that such deposits of county moneys shall, for the purposes of such settlement, be deemed to be in the county

treasury. We do not think this construction is correct. If the legislature had in mind this limited meaning it certainly would not have used the language of this section. Such a construction would appear to make it necessary that the county treasurer should make quarterly settlements with the county commissioners only for strictly county money, and not port or other public funds; in any event, under such a construction, in making such accounting or settlements, he could use his deposits as cash only as to strictly county moneys, and would be required to call in all port and other public funds so that the cash might be counted. Certainly the legislature did not intend any such absurd result. The purpose of this act was to furnish a safe place for the keeping of public funds, make the manner of such banking uniform among all county treasurers, stop the common evil and perilous practices of such treasurers in doing their own banking in their own way and reaping a personal benefit thereby, and incidentally to secure some compensation to the county by way of interest. Keeping in view the purposes which the legislature had in mind and the evils it desired to correct, and reading the act as a whole, it must appear plain that the legislature meant this act to cover any and all public moneys in the treasurer's hands, from whatsoever source they came. We think the legislature used the words "county moneys in his hands or under his official control" in the sense that any public moneys required to be held by the county treasurer become, for the purpose of keeping and handling the same, moneys of the county, and that such words had reference to any public moneys for which the county and its officials are by law responsible.

The legislature has made specific provision for the banking of public funds held by city treasurers (Rem.

Code, § 5078 *et seq.*); also for funds held by the state treasurer (Rem. Code, § 5065 *et seq.*). It would thus appear that the legislature has undertaken to make provision for banking all public moneys, and a holding that no provision has been made for the banking of port district funds would seem to be contrary to the general legislative policy.

The port district is a public corporation and there cannot be any question but what the legislature had a perfect right to require its funds to be deposited with and kept by the county treasurer. The act nowhere undertakes to compensate the county for the expense of handling the port funds, and it may have been that the legislature had in mind that it would so compensate the county by allowing it to have the benefit of any interest it might collect on the port funds. In any event, the whole matter was within the power and discretion of the legislature.

It is contended by appellant, however, that, inasmuch as the act creating the port district was subsequent to the county depositary act, it will not be presumed that it was the intention of the legislature, in the passage of the depositary act, to include moneys belonging to the port district. We cannot agree with this argument. It must be presumed that, when the legislature provided that the port district moneys should be deposited with the county treasurer, it had in mind the provisions of the depositary act requiring that official to deposit in designated depositaries all public moneys in his hands.

We hold that it was not only the duty of the county treasurer to deposit the port moneys in the various depositaries, but also that it was his duty to credit the interest derived therefrom to the county expense fund.

The demurrer was properly sustained. Judgment affirmed.

HOLCOMB, C. J., FULLERTON, MOUNT, and MITCHELL, JJ., concur.

[No. 15486. Department One. December 30, 1919.]

F. Z. HURD, *Respondent*, v. HENRY WYSONG *et al.*, *Appellants*.[1]

APPEAL (406)—REVIEW—DISCRETION—GRANT OF NEW TRIAL. The granting of a new trial on all the statutory grounds rests in the discretion of the trial court, and will not be disturbed except for abuse of discretion.

NEW TRIAL (55)—ORDER—SCOPE. In the granting of a new trial in an action on a contract to pay a fixed price per foot for the digging of a well, defended on the ground that plaintiff had guaranteed to bring in water and had breached his contract by ceasing work, it is proper to permit the plaintiff to make a further test of the well, since he would be entitled to produce new evidence; but it is error to order that plaintiff be permitted to dig the well deeper to bring in water, since he cannot change the theory of or revive the contract after the breach.

Appeal from an order of the superior court for Franklin county, Truax, J., entered April 1, 1919, granting a new trial, after a judgment in favor of defendants, dismissing an action on contract. Modified.

Edward A. Davis, for appellants.

H. B. Noland, for respondent.

MACKINTOSH, J.—The respondent, in his complaint, alleges that he had an oral contract with the appellants for the drilling of a well upon their farm, to be paid for at the rate of $1.50 per foot to the depth of six hundred feet, and $3 per foot for any greater depth. He alleges that he drilled the well to a depth of one

[1]Reported in 186 Pac. 301.

thousand and eighty-six feet, and has not been paid in full therefor, and prays judgment for the balance due and for a lien upon appellants' property. By answer, the appellants (defendants below) admit an oral contract was made with the respondent for the drilling of the well and that he has drilled to the depth claimed, but alleges that, as a part of the contract, respondent guaranteed to furnish a well which would supply a continuous flow of water to the capacity of a two and one-half inch pump. They further allege that respondent failed to furnish such a well, and that no payments have been made on the contract, but that the amounts received by the respondent were loans. They pray for a dismissal of the respondent's action and ask that they have judgment for the amount claimed to have been loaned to the respondent. Upon trial, judgment was rendered for the appellants, dismissing the action and granting judgment as prayed for.

The respondent moved for a new trial, alleging all the statutory grounds, which motion was granted by an order which, in addition to granting a new trial, ordered that the respondent might, within forty days, make a further test of the well in question and, if he so desired, drill the well to a greater depth. The appellants, feeling aggrieved at the order, brought this appeal, and allege as error the granting of the new trial and the granting of the right to make a further test of the well, and the granting of the right to dig the well deeper.

In a case of this kind the granting of a new trial is a matter within the discretion of the court hearing the case, and its action will not be disturbed unless we can say that that discretion has been abused. In the case before us, this cannot be said, and for that reason

the action in granting the new trial will not be interfered with.

That portion of the order granting the new trial which permitted the respondent to make a further test of the well was not erroneous, for the reason that, at the rehearing of the case, the respondent would be entitled to produce such evidence as existed at that time, and he was entitled to go upon the appellants' land and make such further investigation and tests as he might deem necessary to enable him to produce on the new trial such evidence as was available in order to present fully the true situation to the court. The court, however, was in error in including in the order for a new trial permission to the respondent to drill the well deeper. The respondent had brought his action in which he was claiming that he had a contract to dig a well at a certain price per foot, and contended that the contract contained no provision as to the guarantee of a supply of water. The issue, as framed by the pleadings, was as to the existence of such a guarantee. It is not now permissible for the respondent to go again upon the property and attempt by further digging to alter both the facts and pleadings he relied upon at the trial of the original action and to present, at the retrial of the case, an action upon an entirely different theory directly contrary to the one upon which he originally sued and upon which the trial was had. If the contract was as claimed by the appellants, it was breached by the respondent's actions in ceasing work and suing for the value of the services which he performed, and it cannot now be revived by the court allowing the respondent to resume operations for the purpose of complying with a contract which heretofore he had alleged did not exist.

The order for a new trial will be affirmed, omitting from it, however, that portion which would allow the

respondent to drill the well deeper and to amend his pleadings so as to state a cause of action differing from that alleged in his complaint. The appellants will recover their costs in this court.

HOLCOMB, C. J., PARKER, MAIN, and MITCHELL, JJ., concur.

[No. 15502. Department Two. December 30, 1919.]

ANGELA NORMILE, *Appellant*, v. ANNIE DENISON, *Individually and as Executrix of the Estate of S. Normile, Respondent.*[1]

HUSBAND AND WIFE (37, 103-1)—ACTS IN FRAUD OF WIFE—SEPARATION AGREEMENTS. Where a property settlement was induced by the husband's false representations and his concealment of a substantial amount of personal property belonging to the community, which the wife could not have discovered by diligent effort, she may recover her damages, notwithstanding the agreement provided that she waived all rights and claims she might have by reason of any false representations inducing her to enter into it.

SAME (37, 104) — FRAUD — ACTION ON SEPARATION AGREEMENT — PLEADING. Where it appeared from her complaint that a wife was induced to enter into a final property settlement by false representations and concealment, a defense that she knew she had been defrauded by a prior partial settlement and in the final agreement compromised the fraud must be raised by answer, where there was nothing in the complaint to justify assumption of such fact.

SAME (37, 104)—DEFENSES. In an action by a widow to recover a half interest in community property, concealed from her by her late husband upon the making of a property settlement between them, in which she offers to account for all community property received by her in the settlement, the defense that the parties cannot be put in *statu quo* is unavailing, as the court can do equity between the parties.

Appeal from a judgment of the superior court for King county, Jurey, J., entered April 10, 1919, upon sustaining a demurrer to the complaint, dismissing an

[1]Reported in 186 Pac. 305.

action to recover a community interest in property. Reversed.

Preston, Thorgrimson & Turner, for appellant.

Gill, Hoyt & Frye, Chadwick, McMicken, Ramsey & Rupp, and *John P. Garvin,* for respondent.

TOLMAN, J.—This action was brought by appellant against respondent, individually and as executrix of the estate of S. Normile, deceased, to recover one-half of certain community property accumulated by the decedent and appellant during the time they were husband and wife, which, it is alleged, was, at the time of the making of a property settlement between them, fraudulently concealed by the husband.

To appellant's supplemental and amended complaint, a demurrer was interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained by the court below, and the appellant declining to plead further, a judgment of dismissal followed, from which this appeal is prosecuted.

In substance the supplemental and amended complaint alleges that the appellant and S. Normile were married on June 1, 1892, and that the community thus formed continued until dissolved by a decree of divorce entered May 31, 1917, in an action commenced by the wife on March 28, 1917; that, during their married life, considerable property was accumulated, of which the husband had the entire possession and control, the amount and value of which were at all times concealed from the wife; that, on May 16, 1916, the parties entered into a written agreement, which recites:

"That, whereas, the above parties have been married nearly twenty-four (24) years and are now husband and wife, and have since their marriage accumu-

lated considerable property, both real and personal, and

"Whereas, some differences have arisen between said parties hereto, and

"Whereas, both of said parties are of the opinion that it is advisable and better to divide all their property, both real and personal, separate and community,

"Now, therefore," etc.

Then follow provisions by which the wife is to retain her jewelry, and all money and other assets previously given her by the husband, aggregating approximately $4,000 in value; the cash on hand which amounted to $10,000, bonds amounting to $10,131.50, mining stock of the par value of $500, money or bonds due from King county under a contract for grading the Duwamish-Renton roadway, and $5,000 of bonds in escrow in the Seattle National Bank, are all equally divided; a policy of insurance on the life of the husband is given to the wife; the real estate, it is provided, shall remain undivided community property as theretofore. Then follow provisions to the effect that, so long as they shall occupy the same home, the husband shall pay the household expenses, the personal expenses of the wife, the premiums on the life insurance policy, and taxes on real estate; and the profits of his business, after the payment of such expense, shall be equally divided; and that, in the event of their ceasing to occupy the same home, the wife shall thereafter pay for her own maintenance, pay the premiums on the life insurance policy, the taxes and charges on her own property, and the husband shall be entitled to retain the profits of his business; the furniture and effects in the home to be then equally divided, except certain enumerated articles which shall belong to the wife, and the question of blame for the separation shall not affect the settlement. The complaint alleges

that the husband represented that the personal property referred to in the agreement was all the personal property belonging to the community, and that the wife relied solely upon the husband's representations in that respect. It is further alleged that thereafter and on the 28th day of March, 1917, the parties entered into another and subsequent written property agreement, also made a part of the complaint, which recites:

"That, whereas, the above named parties have been married approximately twenty-five years and are now husband and wife, and have since their said marriage accumulated considerable property, both real and personal, and

"Whereas, the parties hereto did on the 16th day of May, 1916, enter into a written agreement which provided, among other things, for a partial division of the property belonging to the parties hereto, and,

"Whereas, since said agreement the parties have lived together, but have again separated, and

"Whereas, the agreement of May 16th, 1916, did not affect a division of the real property belonging to the parties hereto nor of certain personal property belonging to said parties, and,

"Whereas, both of said parties are now desirous of making a full and complete settlement and division of the property interests of the said parties,

"Now, therefore," etc.

Then follows an acknowledgment of receipt by the wife of the various items of property given to her by the prior settlement; a division of the real property, not here attacked; the half of the bonds in escrow in the Seattle National Bank reserved by the husband by the first agreement is given to the wife, as is also all of the furniture and effects in the home, and it is provided:

"(b) All remaining property heretofore belonging to the community, including money, bonds, accounts and bills receivable, are to become the separate prop-

erty of the party of the first part herein, free and clear of any right, title or interest therein on the part of the second party hereto."

Also:

"Fifth: Said party of the second part hereby waives any rights or claims of any kind that she may or might have against the party of the first part herein by reason of the fact that she is now unaware of the existence of any property, money, bonds, accounts or bills receivable, choses in action or any other property of any kind or description whatsoever of which the community may now be possessed; that she hereby further waives any and all rights or claims that she may or might have against the first party herein by reason of any false representations or concealments of any kind made by the party of the first part to her regarding any of the community assets, and said party of the second part further waives any rights or claims she may or might have against said party of the first part by reason of any false representations or concealments of any profits that said party of the first part might have made in the Duwamish-Renton roadway contract or any other contract; and said second party hereby accepts the property herein described as heretofore given her or given her by the terms of this agreement in full settlement of her share of the entire property interests of the community whether the same has been disclosed to her or not."

And also:

"Seventh: The party of the first part agrees on his part to pay all bills, claims or judgments which may have been incurred by him or which may in the future be incurred by him in the conduct of his business, including all existing or future obligations of the marital community, except the taxes and assessments referred to in subdivision (b) of the second paragraph of this agreement, and excepting bills personally contracted by second party after October 18th, 1916, and to indemnify and save the party of the second part harmless on account of the same."

The complaint then alleges that, at the time of the making of the last agreement, the husband, with intent to deceive the wife, fraudulently and falsely represented that he had truthfully disclosed all of the items composing the community estate and the value thereof, and that the property so conveyed and delivered to the wife constituted one-half of all the community personal property; that the attorney who represented the husband had been his counsel for some years and was familiar with his affairs, and that he, too, assured the wife that, so far as he knew or had been advised, the items disclosed constituted all of the community personal property; that she made inquiry at the bank where the husband did business, and of the city officers having charge of the payment of the amounts due the husband under his various contracts, he being a contractor principally engaged in doing work for the city of Seattle, and made such further search and inquiry as was practicable, and learned nothing to cast doubt upon the husband's representations, and nothing to the contrary could have been learned by any inquiry she might have then made; that the husband was not called upon to pay any indebtedness which existed at the time of entering into the contract of March 28, 1917, nor was any such indebtedness thereafter incurred in the conduct of his business, and no such claims were ever presented against his estate, and that the time for presentation of any such claims has expired. It is then alleged that the husband thereafter died testate, and that respondent, after qualifying as executrix, opened certain safe-deposit boxes kept by the husband in his lifetime, and there found and produced cash, local improvement bonds and other securities of the value of $29,000, which the husband had concealed at and prior to the making of the property settlement, and which were a part of the com-

munity estate, the existence of which was wholly unknown to the wife, who thereafter presented a duly verified claim to the executrix for what she conceived to be her interest therein, and her claim was disallowed. She then brought this action, demanding judgment for $14,330, which, with the amounts she has already received, would, as she claims, equal one-half of the community estate as it actually existed at the time of the settlement.

Respondent argues that, as shown by the complaint, the wife did not rely upon the representations made by the husband, or, if she did, she should not have done so under the circumstances pleaded. It is true that, at the time of the making of the last agreement, the parties had been separated for some months; that she was represented by counsel, and had determined to bring an action for divorce. She might, and if she had reason to suspect the husband's good faith, no doubt would, instead of contracting with him with reference thereto, have taken the whole subject of the property division into court. That she did not do so is consistent with her allegations of reliance upon the husband's representations. Taking, as we must, the allegations of the complaint as true, there can be no doubt that the wife was actually defrauded to the extent of her one-half interest in property worth $29,000, the existence of which was unknown to her. There is nothing in the complaint to indicate any fact or facts which would put her on notice as to her husband's intent to deceive. The second agreement refers to identically the same property in every instance as the first, and having no notice that anything was omitted from the first, the natural presumption was that the property described in the first agreement, made at a time when the parties were, and apparently hoped to continue, living together, was all the property there

was to be divided by the second agreement, made when they were no longer living together. Our statute, Rem. Code, § 5292, as to the burden of proof in transactions between husband and wife, would seem clearly to apply to the first agreement, and if so, lacking any showing as to anything to put the wife on notice, occurring after the execution of the first agreement and before the execution of the second, the same burden would continue. But even though the relation of husband and wife did not exist, or if, by reason of the estrangement, it should not have been relied upon here, the facts were peculiarly within the knowledge of the husband, and, according to the allegations of the complaint, the wife could not have discovered the concealed securities no matter how diligent she might have been. We think the pleaded facts bring the case within the rule laid down in *Mulholland v. Washington Match Co.*, 35 Wash. 315, 77 Pac. 497, and *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811.

We cannot hold that one may deliberately conceive a plan to defraud and then, in carrying it into execution, by the use of words such as are contained in the fifth paragraph of the second agreement as above quoted, absolve himself from the consequences. It is conceivable that the wife might have believed that the language referred to was inserted to cover any possible items which may have been forgotten or overlooked in good faith, or even the implements and appliances used by the husband in carrying on his business, which were nowhere mentioned in either contract, but it would shock the conscience to hold that the husband may, by the use of such language, take away all remedy for his deliberate, fraudulent sequestration of a substantial portion of the community estate, which the law entrusts to his sole control and management and of which it requires a true, open and fair accounting

when the community is to be dissolved. No exactly parallel case is called to our attention, but it is generally held that a stipulation in a contract that false or fraudulent representations by which one party has induced the other to enter into it shall not affect its validity is itself invalid and cannot operate by estoppel or otherwise. *Berrendo Irrigated Farms Co. v. Jacobs,* 23 N. M. 290, 168 Pac. 483; *Hofflin v. Moss,* 67 Fed. 440. Even though this language should be held sufficient to put the wife on inquiry, we have already seen that the complaint alleges that discovery could not have been made by any inquiry within the wife's power to make, and the nature of the concealment alleged warrants such a conclusion.

Nor can we follow counsel for respondent in his argument that it appears on the face of the complaint that appellant knew she had been defrauded by the first agreement and that by the second she settled her claim for damages and released the fraud. Of course, one who has been defrauded and knows it, may compromise and settle his right of action for the fraud, but if any such condition obtains here it must be raised by answer, as we can find nothing in the complaint which will justify us in assuming such to be the fact.

It is further contended that a party cannot rescind a contract without offering to put the other party in *statu quo.* That is undoubtedly the law, but, as we view it, this is rather an action to recover damages suffered by reason of the fraud than one for rescission. In any event, appellant in her complaint offers to account for all of the community personal property received by her, and should she finally prevail the court can, by its judgment, do equity between the parties. *Moor v. Moor,* 24 Tex. Civ. App. 150, 57 S. W. 992. Being satisfied that the supplemental and

amended complaint states a cause of action, the judgment appealed from will be reversed, with directions to overrule the demurrer.

Judgment reversed.

HOLCOMB, C. J., BRIDGES, MOUNT, and FULLERTON, JJ., concur.

[No. 15507. Department Two. December 30, 1919.]

THE STATE OF WASHINGTON, *on the Relation of Bertina Tingstead et al., Respondents,* v. J. A. JOHNSON, *Superintendent of Buildings of the City of Seattle et al., Appellants.*[1]

CERTIORARI (30)—SCOPE AND EXTENT OF REVIEW—MERITS. Under Rem. Code, § 1010, limiting the questions involving the merits upon certiorari to whether there was any competent proof of the facts necessary to be found, and, if so, whether there was such a preponderance of evidence against the finding as to warrant setting aside of a verdict by a jury, the superior court cannot weigh the evidence and split the difference between two expert witnesses, upon certiorari to review findings of a board of appeals as to unsafe buildings condemned by the city building superintendent.

Appeal from a judgment of the superior court for King county, Jurey, J., entered April 24, 1919, upon findings in favor of the relators, reversing on certiorari a decision of the board of appeals sustaining an order of the superintendent of buildings of the city of Seattle. Reversed.

Walter F. Meier, Geo. R. Meagher, and *Alex J. Ashen,* for appellants.

HOLCOMB, C. J.—Under and by virtue of the authority vested in him, and in accordance with the provisions relating to such matters in the building code

[1]Reported in 186 Pac. 671.

of Seattle, the superintendent of buildings of Seattle, on March 10, 1919, posted notices on two frame buildings situated on Olive street, in the city of Seattle, being numbered 614 and 616 Olive street, that the buildings were unsafe and ordered the tenants to vacate the same immediately. The lessees, the Tingsteads, appealed to the board of appeals, composed of three disinterested persons, provided for in the city building code, before which a hearing was had. At the hearing the city produced testimony to the effect that the buildings were structurally unsafe and in such a state of dilapidation that they could not be repaired in compliance with the requirements of the building code without exceeding the allowable expenditures therefor. By reason of the removal of a building adjoining the two buildings in question, the two buildings would be left without support. Two witnesses were produced by the lessees, who qualified and testified as to the value of the buildings and the cost of necessary repairing. One testified that the estimated value of the buildings was $700, and the cost of repairs would be $150; the other, that the estimated value of the buildings was about $1,000, and the cost of repairs would be about $150 to $175.

After hearing and considering the testimony, the board of appeals sustained the action of the superintendent of buildings and found that the value of the buildings was $700, and the cost of repairs would be $150, and that the removal of the adjoining building weakened the support of the two buildings.

The lessees then sued out a writ of review from the superior court, where the matter was reviewed upon the transcript of the record of the proceedings before the board of appeals, and upon no other evidence, and the court, reversing the board of appeals, found for the relators. The city has appealed.

The statute providing for writs of review provides, among other things, as follows:

"The questions involving the merits to be determined by the court upon the hearing are: . . .

"(4) Whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination;

"(5) If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence thereof, rendered in an action in court, triable by a jury, [as] would be set aside by the court, as against the weight of evidence." Rem. Code, § 1010.

The city building code, § 1033, p. 174, prohibits alterations aggregating in value more than twenty per cent of the value of such building during any period of twelve months, hence the apparent importance of the proof of the value of the buildings and the cost of repairs.

The trial court seems to have "split the difference between the values and estimates of costs made by relators' witnesses," and so arrived at the conclusion that the necessary alterations would not equal or exceed twenty per cent of the value of the buildings.

But under the provisions of the statute controlling such review, he was not at liberty to do that, but only to determine (a) "whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination" (under review); or (b) "if there was such proof, whether there was, upon all the evidence, such a preponderance of proof against the existence of those facts that the verdict of a jury affirming the existence thereof, rendered in any action in court, would be set aside as against the weight of the evidence." The last provision places the decision of the inferior tribunal

upon precisely the same basis as the verdict of a jury upon contested facts.

Here, first, we have competent evidence to support the decision of the city tribunal, and second, possibly conflicting evidence, all of which would have been for a jury to weigh, and nowhere a preponderance against the existence of the facts found by the inferior tribunal. In fact, there was no dispute in the evidence that the buildings were structurally unsafe.

The validity of the ordinance under which the city proceeded was not called in question below and is not here. Indeed, respondents have not appeared, filed brief, or made any argument here. The provisions of the building code are, generally speaking, within the delegated police power of the city. Its validity as to the exact matter affecting respondents not being questioned, the trial judge, sitting as a reviewing tribunal of the facts passed upon by the inferior tribunal, could only follow the requirements of the statute in that respect, and was not so governed.

The judgment is therefore reversed.

TOLMAN, MOUNT, and BRIDGES, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 15509. Department One. December 30, 1919.]

E. C. SOWLE, *Respondent*, v. F. F. JOHNSON *et al.*, *Appellants*.[1]

LANDLORD AND TENANT (129, 135)—UNLAWFUL DETAINER—DEFENSES—WAIVER BY TENDER—TIME FOR SERVING NOTICE. Tender of the amount admitted to be due for rent prior to the commencement of an action for unlawful detainer, renewed by bringing the tender into court, waives the tenant's option in the lease for an extension of time to pay rent, and precludes the defense that the rent was not due and the notice to quit premature.

SAME (66) — IMPROVEMENTS BY TENANT — LIABILITY OF LESSOR. Where a pipe line constructed by the lessor was in compliance with the terms of the contract to deliver water on two of the highest points of the land, the tenant is not entitled to a credit upon his rent for the cost of reconstruction to better the service, incurred by him without authority from the lessor.

PRINCIPAL AND AGENT (39)—AUTHORITY OF AGENT—ADMISSIBILITY OF EVIDENCE. It is not error to exclude evidence of conversations as to an agent's authority to bind a lessor by an agreement respecting improvements, where his authority as an agent had been terminated and he had informed appellants that the lessor refused to do anything in regard to the matter.

LANDLORD AND TENANT (89) — EVICTION — WAIVER — PAYMENT OF RENT. In unlawful detainer a partial eviction in the preceding year is waived by the payment of rent on the due date without question.

APPEAL (375)—REVIEW—MATTERS NOT BEFORE LOWER COURT. Defendants in unlawful detainer not having pleaded an eviction as a defense, cannot raise the objection for the first time in the supreme court.

Appeal from a judgment of the superior court for Yakima county, Holden, J., entered April 9, 1919, upon the verdict of a jury rendered in favor of the plaintiff by direction of the court, in an action of unlawful detainer. Affirmed.

Stephen E. Chaffee, for appellants.

Grady & Shumate, for respondent.

[1]Reported in 186 Pac. 255.

MACKINTOSH, J.—On January 30, 1917, Cassie A. Rhodes, in writing, leased to the appellants certain lands in Yakima county for a term beginning on that date and ending March 1, 1920. The lease provided that the rent should be payable: $200 on December 1, 1917; $350 on December 1, 1918; and $350 on December 1, 1919, and further provided: "that, in the event the second party shall not be able to market his crops at advantageous prices prior to said date, then, and in that event, said rent need not be paid until February 1, following." The lease also provided that Mrs. Rhodes should "see that water is delivered on two of the highest points on said premises." In December, 1916, Mrs. Rhodes had contracted with one Lichty to give him entire charge of farming operations and improvements made upon the land, and he was the person who, as Mrs. Rhodes' agent, negotiated the lease with the appellants. In order to farm the land it was necessary to construct a pipe line to comply with the provision in the lease which we have quoted. After appellants' lease had been executed, a six-inch pipe line was constructed to carry the water to the leased land and also to supply water for an adjoining owner named Holt. An agreement was entered into between Mrs. Rhodes and Holt whereby Holt was to pay 3/14ths and Mrs. Rhodes 11/14ths of the cost of construction.

In January, 1918, Mrs. Rhodes sold the property to respondent, who informed Lichty of his ownership of the property and terminated the agency which Lichty had theretofore had from Mrs. Rhodes. Respondent also informed the appellants that he was the owner of the land. Subsequent to this time the appellants and Holt undertook a reconstruction of the pipe line so that the Holt land would be better served by a water supply. The matter of this reconstruction was

taken up with Lichty and, without any authority from the respondent, he authorized the appellants to reconstruct the pipe line and to reimburse themselves by retaining 11/14ths of the cost of reconstruction from the rent due the respondent. When the crop for 1918 was sold, the check for it was made out jointly to the respondent and the appellants, the latter depositing it in the bank with instructions to pay $241 of it to the respondent and the balance to them. This $241 represented the difference between 11/14ths of the cost of reconstructing the pipe line and the $350 for the year 1918. When this amount was tendered the respondent he refused to accept it, and on January 17, 1919, gave the appellants the statutory notice to pay the rent or vacate the premises. The appellants failing to comply with this notice, this action of unlawful detainer was brought, upon the trial of which the court entered judgment upon a directed verdict in favor of the respondent.

The first point raised by the appellants is that, as the lease provided that they might have until February 1, 1919, to pay the rent if they could not prior to that time sell their crops advantageously, the notice to quit and suit were premature; that subdivision 3 of § 812, Rem. Code, provides for notice to quit only after default in the payment of rent, and that there had been no default. The lease contained, as we have seen, an option for an extension of the time of the payment of the rent until February 1, 1919, but the appellants, in their answer, pleaded and tendered the rent which they considered due and owing, that is, the sum of $241, prior to the commencement of the action, and renewed the tender by bringing the amount into court. By this act they admitted the rent was then due and owing and waived the option to pay on Feb-

ruary 1, 1919. Their tender amounted to a statement by them that the rent was due at the time the notice to quit was served and suit begun, and they said, by their tender, that they were offering the full amount of the rent due, $241 in cash and $109 in the form of a credit for money which they had expended in reconstructing the pipe line. Where a party claims that he has the option of making payment on different dates and, prior to the arrival of the second date, tenders the entire amount due, or what he considers due, by that act he admits that whatever is owing by him is then due and waives his right to claim the benefit of his option to pay on the later date. The trial court was correct in so holding, and then allowed the appellants to show that the deduction of 11/14ths of the cost of reconstruction of the pipe line was such a deduction as they were entitled to credit for. Upon this question the evidence shows that the pipe line, as originally constructed, complied with the agreement made by Mrs. Rhodes that she would see "that water is delivered on two of the highest points on said premises." The appellants are not entitled to a credit for the reconstruction of this pipe line to better serve the Holt property; the arrangement for this reconstruction not having been authorized by the respondent or by any one rightfully representing him. The testimony below presented no question which was properly submissible to the jury, and the directed verdict was a correct determination of the litigation.

Some claim is made that the notice to quit was defective in that it contained Mrs. Rhodes' name as well as the name of the respondent. As we view the notice, it was sufficient and correct.

Error is also assigned upon the court's refusal to permit testimony by the appellants as to conversations between them and Mrs. Rhodes as to Lichty's author-

ity and the reason of the transfer of the property by Mrs. Rhodes to Sowle. Whatever authority Lichty may have had on the premises was terminated either by the execution of the lease or of the deed to respondent, Lichty's agency not having been coupled with any interest in the land. Further than this, the appellants were notified that respondent was the owner of the land and that Lichty had been notified that he was to do nothing more in regard to the land, and he had informed the appellants that the respondent had refused to do anything in regard to the pipe line; and yet, with this condition of facts, the appellants proceeded under Lichty's assumed authority and rebuilt the line. The evidence is convincing that the original pipe line answered the requirements of the lease.

Finally, it is argued that the appellants suffered a partial eviction by reason that the pipe line, as originally built, was not adequate to deliver sufficient water to the premises. The answer to this lies in the fact that the partial eviction, if there had been one, occurred in the year 1917, for which year the rent was paid on the due date without question, and there is no claim of any partial eviction in 1918, the rent for which is the subject of this litigation, nor was the partial eviction pleaded as a defense and is for the first time raised in this court.

An examination of the entire record satisfies this court that the judgment should be affirmed, and it is so ordered.

HOLCOMB, C. J., MAIN, PARKER, and MITCHELL, JJ., concur.

[No. 15517. Department One. December 30, 1919.]

E. M. GORDON *et al., Respondents,* v. C. D. HILLMAN *et al., Appellants.*[1]

HUSBAND AND WIFE (98) — COMMUNITY PROPERTY — DESCENT TO HEIRS. On the death of a wife, intestate, the title to one-half the community real property vested immediately in her two minor sons.

DEEDS (15-21)—DELIVERY—DEPOSIT IN COURT. Where deeds of a husband and wife, tendered and filed in court, were, at all times pending an appeal by the adverse parties, subject to recall on abandonment of the controversy, they became ineffectual for any purpose as to the wife's interest upon her death before termination of the suit.

HUSBAND AND WIFE (98)—COMMUNITY PROPERTY—RIGHTS OF HEIRS —JUDGMENT AGAINST HUSBAND AND WIFE—EFFECT. A judgment rescinding a trade and imposing reciprocal and concurrent obligations of reconveyance, with an alternative of a future money judgment, does not prevent community property from descending to the heirs upon death of one of the parties before performance.

ABATEMENT AND REVIVAL (23)—DEATH OF PARTY—PENDING FINAL JUDGMENT. A judgment rescinding a trade and imposing reciprocal and concurrent obligations of reconveyance, with an alternative of a future money judgment, is not in its practical effect a final judgment; and upon death of a party plaintiff more than one year prior to final judgment, the action abates, unless revived by substitution of her personal representative within one year, under Rem. Code, § 193.

EXECUTORS AND ADMINISTRATORS (117, 120)—SALE OF REAL PROPERTY—PETITION—NOTICE. The court cannot order an administrator to execute a deed of community property in compliance with a judgment without any administrator's petition or notice to minor heirs, and the deed executed by him individually and as administrator is ineffectual to pass title to one-half of the property, under Rem. Code, §§ 1498, 1499, 1502, and 1692.

JUDGMENT—COMPLIANCE—CONCURRENT OBLIGATIONS. Where a judgment to rescind a trade imposed upon the parties reciprocal and concurrent obligations as to reconveyance within a specified time, the failure of one party to reconvey relieves the other.

JUDGMENT (111-1) — VACATION — DEATH OF PARTY. Under Rem. Code, § 464, subd. 6, a judgment may be vacated by a direct attack in

[1]Reported in 186 Pac. 651.

the court where the judgment was rendered, on the ground of death of one of the parties before the judgment.

ABATEMENT AND REVIVAL (24) — DEATH — TIME FOR SUBSTITUTION. Under Rem. Code, § 193, the right of survivors to substitution on the death of a party is limited to one year.

Appeal from a judgment of the superior court for King county, Ronald, J., entered April 26, 1919, denying a petition to vacate a judgment, after a hearing before the court. Reversed.

Carroll B. Graves, for appellants.

Byers & Byers and *Aust & Terhune,* for respondents.

MITCHELL, J.—The history of the cause as to preceding litigation between these parties concerning the subject-matter still in controversy will be found in *Gordon v. Hillman,* 91 Wash. 490, 158 Pac. 96; *State ex rel. Gordon v. Smith,* 98 Wash. 100, 167 Pac. 91. 169 Pac. 468; *Gordon v. Hillman,* 102 Wash. 411, 173 Pac. 22; and *State ex rel. Hillman v. Superior Court,* 103 Wash. 288, 174 Pac. 14.

The original decree, which was affirmed in *Gordon v. Hillman,* 91 Wash. 490, 158 Pac. 96, while it fixes the plan by which the rights of the parties in relation to matters with which we are now immediately concerned should be adjusted, was not in its practical effect a final decree. After the remittitur in that case was filed in the lower court, that court attempted to finally determine those rights on January 5, 1918, and entered a judgment the validity of which is now directly attacked. On April 26, 1918, in the case of *Gordon v. Hillman,* 102 Wash. 411, 173 Pac. 22, the Hillmans filed their petitions in this court to recall the remittiturs in the cases of *Gordon v. Hillman,* 91 Wash. 490, 158 Pac. 96, and *State ex rel. Gordon v. Smith, supra,* and for an order vacating the judgment

in the original case, upon the ground that, after the entry of that judgment and the perfecting of the appeal therefrom, and prior to its affirmance by this court, Mrs. Gordon, one of the plaintiffs, had died. The petitions to recall the remittiturs were denied on May 11, 1918; but, because of a showing therein made, permission was granted Hillman and wife to proceed, as they might be advised, in any form of action in law or in equity for relief.

On the 27th day of May, 1918, the Hillmans filed a petition in the superior court to vacate and set aside the judgment of January 5, 1918. After personal service of the summons and petition, counsel for Gordon appeared specially and objected to the court's hearing the petition for want of jurisdiction, because, as alleged, the petition was one to vacate what was in legal effect a judgment of the supreme court, without any permission therefrom to the superior court to entertain such petition. The trial court favored the contention made upon the special appearance and orally announced it would not entertain the petition. Thereupon an application was filed in this court by the Hillmans on June 24, 1918, for a writ of mandate to compel a hearing on the petition in the superior court. The application was granted on August 1, 1918, and the decision is reported in *State ex rel. Hillman v. Superior Court, supra.* In the application in that case the relators, in order to advise this court of their grievance presented in the superior court, set out in full the petition of the Hillmans filed in the trial court on May 27, 1918, to vacate the judgment of January 5, 1918, which is the same petition involved in the present appeal.

In the decision of this court just referred to, important provisions of both the original and final judg-

ments are set out somewhat at length and need not be noticed here, other than to observe that the original decree provided for mutual conveyances and transfers of real and personal properties within thirty days from the judgment, or thirty days from the coming down of the remittitur in the event of an appeal to the supreme court, and further provided as against the Hillmans that, in the event they did not reconvey certain described real property, there should be money judgments against them for amounts specified which were declared to be the values of particular pieces of real property; while the final judgment of January 5, 1918, declared that, at that date, the Gordons had fully complied with all the terms of the original decree, including the tendering into court of a special warranty deed reconveying to the Hillmans, but that the Hillmans had not reconveyed; whereupon, among other things, a money judgment was entered against them in the sum of $45,000, as provided in the alternative contained in the original decree. That opinion holds that the judgment of January 5, 1918, was a judgment of the superior court, and not of this court, on the theory that the original judgment was not final in some respects, but only provided the basis for final judgment in those respects, including, among other things, the determination by the superior court of the sufficiency of the conveyances to be made by the respective parties in the final adjustment of their rights in compliance with the original decree. Thereafter, in the opinion, noticing that the petition to vacate the final judgment alleged fraud on the part of Gordon, in that the conveyances tendered by him in court on January 5, 1918, were insufficient, thus inducing the court to erroneously enter the judgment now sought to be set aside, we said:

"Manifestly, there could be and was presented upon that hearing the question of the sufficiency of such conveyances, which the court was called upon to decide, and as to which fraud could be practiced upon the court, inducing a wrong decision; furnishing relators cause for relief such as they in their petition and their application to this court are seeking."

And we concluded therein it was the duty of the superior court to entertain the petition and directed it to proceed to a final determination thereof. Afterwards issues were made up, the cause was heard, and the trial court entered a judgment denying the petition to vacate the final judgment, and the Hillmans have appealed.

The trial on the petition to vacate occurred in April, 1919. It appears from the evidence that Mrs. Gordon, who was living with her husband when they acquired the property from the Hillmans, died on August 22, 1914, during the pendency of the appeal from the original judgment. She left surviving her two minor sons, Donald P. and Douglas G. Gordon, one of whom, Donald P., attained the age of majority on March 2, 1918, while the other is yet a minor. Mr. Gordon was appointed and qualified as administrator of his wife's estate on September 17, 1914, and there is no showing as to the distribution of property or the closing of the administration of the estate. On July 23, 1913, prior and preparatory to the commencement of the original action, Gordon and wife executed and tendered to the Hillmans three several instruments and transfers, offering to reconvey all the real and personal property they had received in the trade, and demanded reconveyance from the Hillmans of property they had received. The tender was kept good by the filing of the instruments in court upon the commencement of the original suit a few days thereafter. Those three

instruments remained in the registry of the court. The original judgment was entered on February 28, 1914, and the remittitur from this court, showing an affirmance of that judgment, was filed in the superior court on April 2, 1917.

On May 2, 1917, Gordon, as administrator of his wife's estate, filed a petition in the probate department of the superior court for an order authorizing him as such administrator to make conveyances and transfers of real and personal property back to the Hillmans, and immediately, without any order to show cause or notice of any kind, and without any appearance or consent of the minors or either of them, the superior court made and entered an order purporting to grant authority as requested in the administrator's petition. On the same day Gordon, individually and as administrator, executed a special warranty deed to the real property theretofore acquired from the Hillmans, designating therein Hillman and wife as grantees; and also Gordon, individually, executed a bill of sale of all the personal property theretofore received from the Hillmans, designating Hillman and wife as vendees; and on that day, with one of his attorneys, tendered the two instruments to one of the then attorneys for the Hillmans, claiming they were in compliance with the terms of the affirmed decree or decision in the cause between them. The instruments were initialed on the margin for identification by the Hillmans' attorney, rejected and handed back to Gordon and his attorney, who on the same day deposited them with the clerk of the court, who, it seems, placed them in an envelope already containing the three deeds dated July 23, 1913.

On the other hand, on September 30, 1917, Hillman and wife, as grantors, executed two special warranty deeds covering the real property and a bill of sale of

the personal property they had received from the Gordons, in each of which E. M. Gordon, individually and as administrator of his wife's estate, is named as grantee, and on October 17, 1917, filed them and had them marked as filed by the clerk of the court in the original case. At the present trial, the judge in whose department the cause had been pending, and who signed the final judgment of January 5, 1918, testified that, prior to the date of the final judgment, one of the attorneys for the Hillmans had informed him that the Hillmans had executed deeds in compliance with the original decree and that they were in the registry of the court. It appears that, on January 5, 1918, one of the attorneys for respondents, having in his possession the three instruments dated July 23, 1913, executed by Gordon and wife, and two other instruments, one executed by Gordon individually and as administrator, and the other by him individually on May 2, 1917, all running to Hillman and wife, appeared in court and stated he had deeds which complied with the order of the court and that he wanted the judgment he was entitled to against the Hillmans. The trial judge, without examining the deeds, assumed they were sufficient to protect appellants and signed and entered the judgment now in question. The five instruments were returned and filed in the clerk's office. There is a dispute in the evidence as to whether or not appellants' then attorneys actually saw and examined the deeds used in obtaining the final judgment for more than ninety days and until just a few days before they filed their petition to vacate the judgment, although they had ample opportunity to do so. However, the dispute is unimportant, as we view the case. It further appears that, after the present petition to vacate the final judgment was filed, Gordon, as guardian of the person and estate of Douglas D. Gordon,

a minor, made and filed in the probate department of the superior court his petition for an order authorizing him to convey to the Hillmans by special warranty deed the lands theretofore conveyed by them to the Gordons, and that immediately, without any order to show cause or notice of any kind, the superior court made and entered an order purporting to grant such authority; and on July 22, 1918, such a deed was executed by Gordon, individually and as guardian of Douglas D. Gordon, to the Hillmans. This deed was also signed by Donald P. Gordon, of age at that time. The deed was not delivered, but was offered and received in evidence at the present trial.

The purpose of the original action was the rescission of mutual conveyances of real and personal property. The plaintiffs therein prevailed over the defendants and obtained a judgment directing restoration, each to the other, of the property theretofore conveyed, and to preserve certain equities in favor of the respective parties. Conscious of the rule that a deed procured by fraud vests title in the grantee, the judgment properly imposed upon the parties the reciprocal and concurrent obligations of reconveyances within a specified time; in the alternative, however, in part as to the defendants, carrying the possibility of a future money judgment against them. The property acquired by the Gordons became community property, and upon the death of Mrs. Gordon, intestate, on August 22, 1914, the title to one-half of the real property vested immediately in her two minor sons. Rem. Code, §§ 1342, 1366. The three deeds of reconveyance of Mr. and Mrs. Gordon, tendered to the Hillmans prior to the original suit, became wholly ineffectual, upon her death, as to one-half of the community real property, because they had been tendered, and the tender kept good by deposit in court in connection with

their suit, upon condition that the Hillmans reconvey or be compelled to do so, and because she died while the Hillmans, under the specific terms of the original decree and their right of appeal and supersedeas, were still protesting against the enforcement of the condition upon which the tender was made, during all of which time the Gordons were entitled to abandon the controversy and recall the deeds. The deed executed by Gordon, individually and as administrator of his wife's estate, to the Hillmans, and tendered on May 2, 1917, which was rejected by the Hillmans' attorney, was insufficient as to the title to one-half of the real property. Such must be the case, whether it be considered an attempt on the part of the administrator to make a public or private sale, since there was no show cause order made upon the administrator's petition to sell, and consequently no notice of a hearing published or personally served on the parties interested in the estate, including the minor heirs, nor any appointment of or appearance by a guardian *ad litem* for the minor heirs, as required by §§ 1498, 1499, 1502 and 1692, Rem. Code.

With these deeds in his possession, but without advising the court that such were the deeds referred to, counsel for Gordon represented to the court that he had sufficient deeds to comply with the original decree on Gordon's behalf and he wanted his alternative judgment against the Hillmans. The court relied on the representation and entered a judgment, erroneously finding that the Gordons had complied with the original judgment and that the Hillmans had not, and entered a money judgment against the Hillmans for about $45,000, subject to immediate execution. The matter of actual or positive fraud is not involved. There is not a vestige of proof to show that counsel, or any of them, were actuated by dishonest motives.

They still contend, erroneously we say, with perfect candor, as they did then: (a) that the obligations imposed by the original judgment on the Gordons, even if left undone, would in no way relieve the Hillmans from a strict compliance on their part to convey or suffer a money judgment; (b) that no interest in the real property descended to the minor heirs upon the death of Mrs. Gordon, because of the original judgment prior to her death; (c) that the Gordon deeds of July 23, 1913, were delivered, because tendered and brought into court; and (d) that those deeds, together with the one of May 2, 1917, by Gordon, individually and as administrator, were all that was necessary to convey title. Nor do we think the so-called guardian's deed of July 22, 1918, in any way relieved the situation, it being ineffective to convey any interest or estate.

Further, this proceeding is also a direct attack upon the final judgment of January 5, 1918, and the first direct attack ever made, and the only one ever made in the superior court. As already noticed, and as was stated in *State ex rel. Hillman v. Superior Court, supra,* the original judgment was not in its practical effect a final judgment. It imposed reciprocal obligations to be performed in the future, for the accomplishment of which Mrs. Gordon was a necessary party. She died more than a year prior to the final judgment, and neither her representative nor successors in interest have ever been substituted to continue the action. At common law, all actions pending abated upon the death of a necessary party. If the cause of action was one that did not survive, death finally ended the action; but if a cause of action was one that did survive, a new action by or against the personal representative of the deceased party was necessary to prose-

cute the remedy. Touching the latter class of actions, our statute, Rem. Code, § 193, provides as follows:

"No action shall abate by the death, marriage, or other disability of the party, or by the transfer of any interest therein, if the cause of action survive or continue; but the court may at any time within one year thereafter, on motion, allow the action to be continued by or against his representatives or successors in interest."

Which, of course, means if there is no substitution within one year the action does abate.

In the case of *Overlock v. Shinn,* 28 Wash. 205, 68 Pac. 436, this court considered a situation wherein a party commenced an action of the kind that survives, and during the pendency of the action the plaintiff died. Nothing further was done in the case for more than a year, when a new action was started on the same cause by the administrator of the deceased person, whereupon the defendant affirmatively pleaded in bar the commencement of the former suit, the service of summons and the answer of defendant therein, and the death of the plaintiff in the first suit, that no representative or successor in interest of the deceased person continued that action, and that such former action was still pending and undetermined. It was decided that a demurrer to the special plea was properly sustained. In the opinion, upon noticing the contentions that the first clause of the statute was mandatory and provided against abatement in the case of death of one of the parties if the cause of action survived; that the latter clause, permitting the action to be continued by the representative, is permissive only, and whether it is so continued or not, it is still an action pending, and therefore a bar to another action on the same cause until the former action is disposed of, it was held otherwise, this court saying:

"The statute conferring the right must, therefore, be read as a whole, and effect be given, if possible, to all of its provisions. In the statute before us, while it states in the first clause, as the appellant says, that no action shall abate by the death of a party, it is plain that the second clause is a limitation upon the first. By this second clause the right of the representative to continue the action is limited to one year."

And further in the same case said:

"It was intended to be remedial; to promote justice, not to operate as a denial thereof; and a proper construction of its provisions authorizes the conclusion that an action after the death of a party abates if no application is made to continue it within one year after the death of such party."

That the rule concerning the abatement of actions is applicable to final judgments made after interlocutory judgments, is supported by the authorities collected in note V-g, *Kager v. Vickery,* 49 L. R. A. 166.

To avail themselves of the right to have set aside the final judgment entered after the death of Mrs. Gordon, appellants have proceeded directly in the cause and court where the error occurred, according to subdivision 6 of § 464, Rem. Code, which provides for vacating a judgment: "For the death of one of the parties before the judgment in the action; . . ." Such a judgment, whether it be considered void or voidable, is, according to general authority also, subject to direct attack. 15 R. C. L., p. 703, § 155; *Claflin v. Dunne,* 129 Ill. 241, 21 N. E. 834, 16 Am. St. 263; *Seeley v. Johnson,* 61 Kan. 337, 59 Pac. 631, 78 Am. St. 314; *Cochrane v. Parker,* 12 Colo. App. 169, 54 Pac. 1027; *Alvis v. Saunders,* 113 Va. 208, 74 S. E. 153.

On the contrary, it is contended by respondents that the judgment complained of is "valid in every way," because this court, in the case of *Gordon v. Hillman,*

102 Wash. 411, said: "the further proceedings in this court thereafter were not void nor voidable, and were not even erroneous," and because, in the case of *State ex rel. Hillman v. Superior Court, supra,* this court, in effect, said the original judgment was not in its practical effect a final decree, and that the subsequent proceedings were only carrying out the decree already existent. But we do not so understand. In the first place, both of these were original cases in this court, and the statute, § 464, Rem. Code, provides that proceedings to vacate a judgment must be commenced in the superior court where the judgment was rendered. And, besides, what was decided in this regard in the case of *Gordon v. Hillman,* 102 Wash. 411, was that the original appeal to this court did not abate by the death of Mrs. Gordon, and we refused to recall the remittitur; while in the other case it was held that the trial court was authorized to proceed to judgment. But it was not said that the trial court could proceed to a proper judgment in the absence of the representative or successors in interest of Mrs. Gordon.

It may be further noticed that, in *Gordon v. Hillman,* 102 Wash. 411, it was held that the death of Mrs. Gordon, after appeal taken in the original suit, did not affect the appeal, because of the statute allowing either party to suggest the death and to have the substitution of a representative at any time during the appeal. Not so, however, at the date of the final judgment, January 5, 1918; for at that time—indeed, prior to the going down of the remittitur in the Hillmans' appeal in the original action—Mrs. Gordon had been dead more than a year, and hence the right of any of the surviving parties to the action to suggest the substitution of her representative or successors in interest had expired according to the terms of the second clause of § 193, Rem. Code.

Respondents contend there have been certain ratifications by appellants of the judgment. All of the evidence relied on has been examined and we are satisfied the claim is without merit. It involves matters of fact a detail of which can serve no useful purpose.

Reversed, with directions to the trial court to set aside the judgment of January 5, 1918.

HOLCOMB, C. J., PARKER, MACKINTOSH, and MAIN, JJ., concur.

[No. 15404. Department Two. January 2, 1920.]

WILLIAM JOHNSON, *Respondent*, v. NORTH COAST STEVEDORING COMPANY, *Appellant*.[1]

TRIAL (55)—TAKING CASE FROM JURY—SUFFICIENCY OF EVIDENCE. On defendant's motion for nonsuit, the evidence must be viewed in the light most favorable to the plaintiff, who is not bound by unfavorable testimony of one of his own witnesses.

MASTER AND SERVANT (101) — ASSUMPTION OF RISK — PROMISE TO REPAIR—LIABILITY. In order to recover for personal injuries sustained by a servant while working upon a dangerous floor covered with oil, the servant must prove (1) his complaint to the foreman; (2) assurances that the conditions would be remedied; (3) reliance on the assurances; (4) injury before a reasonable time for making the repairs; and (5) that the risks were not so imminent as to require him to stop work notwithstanding the promise; this rule applying to the place of work as well as to the machinery.

SAME (101, 161)—ASSUMPTION OF RISKS—PROMISE TO REPAIR—RELIANCE UPON—EVIDENCE—SUFFICIENCY. The evidence supports a finding that plaintiff, injured upon a floor covered with oil, relied upon the foreman's promise to obtain sawdust, when it appears that for two hours repeated complaints were made, the foreman made several attempts to get the sawdust and gave assurances that he would do so, which assurances were at no time withdrawn.

DAMAGES (84, 88)—EXCESSIVE DAMAGES—INJURY TO LEG. A verdict for $5,000 for injuries to a stevedore are not excessive, where he was seriously bruised, his knee was broken and his kidneys injured and he suffered much pain in a hospital for seven weeks, it

[1]Reported in 186 Pac. 663.

would probably be a year before he could perform his usual work, he might not be able to do heavy work, and his doctor's bills came to several hundred dollars.

Appeal from a judgment of the superior court for King county, Allen, J., entered February 18, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a longshoreman in loading a vessel. Affirmed.

Roberts & Skeel, John T. Hunt, and *L. B. Schwellenbach,* for appellant.

Henry W. Pennock and *James R. Gates,* for respondent.

BRIDGES, J.—Suit for damages on account of personal injuries. The complaint alleged that the defendant was engaged in the stevedoring business, and that, on the 20th of May, 1918, it undertook to load the steamship "Takai," at the Union Pacific Dock, Seattle; that, prior to such time, the vessel had been employed in transporting soya bean oil, and by reason of the breaking of certain oil containers, the floor in the hold of the vessel had become covered with oil; that the plaintiff was employed by the defendant to assist in loading the vessel, and that he commenced such work at about ten o'clock in the forenoon; that the cargo to be loaded consisted of steel and iron bars; that, as soon as plaintiff and the other members of the loading crew began stowing away bars in the hold of the vessel, plaintiff discovered that the floor was slippery and more or less dangerous to work upon, such condition being caused by the oil which had soaked into the wood and which lay on the surface thereof; that plaintiff, immediately after going to work, called the attention of the foreman in charge of such operations to the danger of the slippery floor,

and protested against working without a covering of sawdust; that such foreman then promised plaintiff that sawdust would be procured as soon as possible and spread upon the floor; that, after plaintiff had worked about an hour, a bundle of bars was lowered through the hatchway and held suspended above the floor while plaintiff and other members of the crew swung it back and forth for the purpose of steering it behind certain stanchions near the hatchway; that plaintiff was pulling the bars at one end, while the remainder of the crew was pushing at the other end; that, when the bars were in position where it was desired to drop them, signal was given to the winchman, who dropped the bars, and that plaintiff, because of the slippery floor, slipped as they were being dropped, and they fell on him, causing serious injury.

The defendant denied generally all of the allegations of the complaint, and pleaded assumption of risk and contributory negligence.

Plaintiff's testimony followed closely the allegations of his complaint. In addition, it tended to show that plaintiff was an experienced stevedore; that he had helped unload the vessel and knew of its slippery floors before he commenced the work at which he was injured; that there were five other men working in the hold with him while loading; that the bars were about twenty feet long; that, after he had been working a little less than two hours, he was injured; that a sling load of bars was being lowered into the hold of the vessel and the plaintiff was pulling it and his co-laborers were pushing it, and that, when it reached the desired place, they gave the winchman a signal to drop the bundle, and just as the load was being suddenly dropped, the plaintiff slipped and fell under the bars and was injured. There was testimony tending to show that, before plaintiff commenced the work, he

complained to the foreman, or "boss," of the slippery condition of the floor and asked for sawdust; that, several times thereafter, he and his fellow-workmen complained and asked for sawdust; that the foreman, or "boss," had told them more than once that he would try to get some sawdust. Hereinafter we will more particularly discuss the testimony with reference to the alleged promise of the foreman to get the sawdust.

The defendant introduced no testimony other than that of one expert witness as to the extent of the plaintiff's injury. When plaintiff rested his case, defendant moved for nonsuit, which motion was denied. When the testimony was all in, the defendant moved for a directed verdict, which was denied. There was a verdict for $5,000. Defendant's motion for judgment notwithstanding the verdict was denied, as was also its motion for a new trial. From judgment entered on the verdict, this appeal is taken.

The chief points raised by appellant are, that the plaintiff assumed the risk; that there was no promise to repair, and if there were such promise, plaintiff did not rely upon it; and, finally, that the plaintiff was guilty of contributory negligence.

For the purpose of this discussion, it may be conceded that respondent knew of the slippery condition of the floor and assumed all of the risk incident to working thereon and cannot recover, unless he complained of such conditions and received assurances that the same would be corrected, and that he continued to work relying upon such assurances. Appellant contends that the testimony fails to show any such assurance. In determining this question we are required to review the plaintiff's evidence in the light most favorable to him. In the case of *Shea v. Seattle Lumber Co.*, 47 Wash. 70, 91 Pac. 623, this court said:

"The sole question presented is whether the evidence sustained the verdict and judgment. In passing on this question we must consider the evidence in the light most favorable to respondent."

In the case of *Harris v. Saunders*, 108 Wash. 195, 182 Pac. 949, this court, in discussing a question of like character, said:

"It must be remembered, also, that, in passing upon this question, the appellant was entitled to have considered, where the evidence is contradictory, or where favorable or unfavorable inferences can be drawn from the evidence, that part of the evidence most favorable to his contention. It is not the rule that a litigant is bound by the unfavorable testimony of a witness, even though that witness may be one he himself produces; that is to say, if a plaintiff produces evidence tending to support his allegations and then introduces a witness who contradicts his former evidence, he may still go to the jury on the question, as the contrary rule would always place him at the mercy of a designing witness."

The rule laid down by the authorities generally, and approved by the many decisions of this court, is that, where an employee goes to work at a place that is, or with machinery and implements which are, defective or dangerous, and he complains to the master of such condition, and gives him to understand that he will quit work unless such condition is remedied, and the master gives the servant assurances that such condition will be remedied, the latter may continue at his labor for such reasonable length of time as it would appear proper for the repair to be made, or the promise of the master to be complied with, provided, he continues at such work relying upon the promises or assurances, and that, under these conditions, the workman will not be held to have assumed the risk. Nor is it necessary that the workman should

say in express words that he will stop work unless the repairs are made, but it is sufficient if his words and conduct are such as to indicate to the employer that such was his intention; nor is it necessary that the employer should make any absolute or express promise or assurance of repair or to remedy such defect, but such promise or assurance may be implied from the words and acts of the employer.

Mr. Labatt, in his work on Master and Servant, vol. 4 (2d ed.), § 1343, states the rule in the following words:

"In order to entitle the servant to recover, the master or his representative must have said something which would reasonably be construed as a stipulation to prevent or to remedy the dangerous conditions in question. But the mere fact that no formal promise was given is not sufficient to exclude the inference of an agreement by the master to furnish or restore normally safe conditions. Any acts or expressions by which the servant gives the proper agent of the employer to understand that he is unwilling to continue in the employment, unless the cause of the danger is removed, constitute a sufficient complaint; and any acts or expressions by which such agent gives the servant to understand that the cause of the danger will be removed, constitute a sufficient promise."

This court, in the case of *Alkire v. Myers Lumber Co.*, 57 Wash. 300, 106 Pac. 915, quoted with approval the rule as announced in the last sentence of the foregoing statement. A partial list of the decisions of this court dealing with this question is as follows: *Carlson v. Wilkeson Coal & Coke Co.*, 19 Wash. 473, 53 Pac. 725; *Johnson v. Anderson etc. Lumber Co.*, 31 Wash. 554, 72 Pac. 107; *Keating v. Pacific Steam Whaling Co.*, 21 Wash. 415, 58 Pac. 224; *Crooker v. Pacific Lounge & Mattress Co.*, 29 Wash. 30, 69 Pac. 359; *Easterly v. Eatonville Lumber Co.*, 60 Wash. 647,

111 Pac. 876; *Leeson v. Saw-Mill Phoenix,* 41 Wash. 423, 83 Pac. 891; *Cook v. Pittock & Leadbetter Lumber Co.,* 51 Wash. 316, 98 Pac. 1130; *Morgan v. Rainier Beach Lumber Co.,* 51 Wash. 335, 98 Pac. 1120, 22 L. R. A. (N. S.) 472; *Alkire v. Myers Lumber Co.,* above; *Beseloff v. Strandberg,* 62 Wash. 36, 113 Pac. 250; *Terry v. Merrill & Ring Logging Co.,* 65 Wash. 225, 118 Pac. 27; *Lundgren v. Pacific Coast Steamship Co.,* 103 Wash. 81, 173 Pac. 1023; *Tatum v. Marsh Mines Consolidated,* 108 Wash. 367, 184 Pac. 628, 187 Pac. 410.

From these authorities it would appear that it was necessary for the plaintiff to prove, in order to recover, the following: (1) that he complained to the foreman of the condition of the floor; (2) that the foreman gave assurances that such conditions would be remedied; (3) that the plaintiff relied upon such assurances; (4) that he was injured before a reasonable time had expired within which the repair could have been done; and (5) that the risks resulting from the condition of the floor were not so imminent as to require the plaintiff to stop work, notwithstanding the promise to repair. Let us see whether the plaintiff's testimony brought him within the rules we have announced.

It may fairly be stated that the plaintiff's testimony shows that he and his fellow-workmen, during the two hours they were loading the vessel, several times complained to the foreman about the slippery condition of the floor and demanded sawdust in order to remedy the defect; that at least two or three times the foreman, in answer to these demands, stated: "I will go see if I can find any sawdust," or, "I will go and see what I can do," or, "I will go and see if I can get some"; that, at these several times, the foreman left the vessel and tried to get some sawdust, and

reported back that he had not succeeded in getting any. However, he procured a barrel of wheat chaff, and this was spread upon the slippery floor, but the plaintiff and his fellow-workmen thereafter continued to complain and to demand sawdust. But appellant contends that the testimony shows that the foreman finally said to the plaintiff and his co-workers that he could not get any sawdust, and that the wheat chaff was all he could get, and that thereafter he made no further promise or assurance of sawdust and ceased his effort in that regard. If this position is supported by the testimony, then the plaintiff assumed the risk, because the promise itself would have ceased and plaintiff could not have continued his work in reliance upon any promise to repair. The direct and cross-examination of the foreman Riggle supports appellant's contention, but on redirect examination he said: "After I brought the chaff they said 'Get some sawdust. This ain't no good.' And I said 'I'm trying to get some. Ain't I doing the best I can?' I again went out to get some sawdust." The testimony of plaintiff's witness Quartman shows clearly that Riggle, the foreman, at no time indicated to the workmen that he had ceased trying to get the sawdust, or that he would not furnish it to them. The testimony of the plaintiff's witness Whitney was certainly to the effect that the foreman finally told the workmen that he could not get any sawdust, and led them to believe that he would not make any further efforts in that direction. The plaintiff testified on that question as follows:

"Before I went to work I made complaint to Mr. Riggle (the foreman) I wanted some sawdust. It was not fit to work down there. He said he would try to get some. He went away and came back and said he didn't have any then; it was over in No. 2. We

had to have it and he went back again and brought some wheat chaff. After the wheat chaff was brought down I made complaint for some sawdust and he said he would try to get some. When he came back he said 'I cannot get any at the present time.' After Mr. Riggle said he tried to get some sawdust he went away, but I don't know where he went. Every time we saw Riggle we made complaint for sawdust—I don't know how many times, about eight or nine, or ten times probably."

Taking the plaintiff's testimony, as we must, in the light most favorable to him, it must be admitted that there was some testimony, at least, to show that the plaintiff not only made complaint and demand for sawdust, but that the foreman, by his words and conduct, gave assurances he would get the sawdust, and that he at no time withdrew such assurances, or ceased his effort to get the sawdust, and that the plaintiff at all times had a right to continue with his work in the belief and understanding that the sawdust would be forthcoming. There was ample testimony on these questions to carry the case to the jury.

Appellant's contention that the rule relieving an employee from assumption of risk has no application to the place of employment, but applies only to machinery or other appliances, cannot be upheld. There is no reason why it should not apply to the place of work as well as to the machinery with which the work is being done, and this court has so held.

In the case of *Terry v. Merrill & Ring Logging Co.*, 65 Wash. 225, 118 Pac. 27, we said:

"The appellant contends that the rule which absolves an employee from assumption of risk does not apply to the place of employment, but only to cases where tools, machinery, or other appliances are used, and the promise is to repair or adjust such appliances. While a majority of the reported cases arose upon a

promise to remedy defects in tools or machinery, the rule must be logically held to apply to a promise to remedy defects in the place of work as well as defects in tools or machinery. The logical basis of the rule, as it seems to us, is found in an implied contract. . . . But whatever the basis of the rule, this court has stated it broadly as applying to the place of work as well as to appliances, and we think that position sound."

To the same effect are the following cases: *Morgan v. Rainier Beach Lumber Co.* and *Beseloff v. Strandberg, supra.*

Appellant further contends that the respondent was guilty of contributory negligence. We have carefully considered the argument in this regard, and without following it in detail, we are content to say that the court could not hold, as a matter of law, that the plaintiff was guilty of contributory negligence. The case was properly sent to the jury.

What we have already said is sufficient answer to appellant's contention that the court erred in giving certain of its instructions and in refusing to give certain requested instructions. Neither do we find any merit in appellant's contention that certain testimony with reference to wages of the plaintiff was erroneously received.

The verdict was for $5,000, which, it is contended, was excessive. The testimony shows that the respondent's right knee was broken, and that his left leg was cut and considerably injured; that his head was also bruised; that he was in the hospital from the 20th of May to the 8th of July; that, during a considerable portion of that period, he suffered a great deal of pain; that his kidneys were injured, also causing suffering; that while there is a good union of the broken leg, yet, at the time of the trial in October following his injury, plaintiff had not regained the full use of it, and his

kidneys continued to give him some trouble. His attending physician testified that he believed the kidney trouble was not particularly serious, and that it was impossible to tell whether or not the injury to the right leg was permanent, although he inclined to the view that it was not; that it would probably be a year from the time of the injury before the respondent would be able to perform his usual work, and that he might not even then be able to do heavy work. There was an expense of several hundred dollars for doctor and hospital bills. The trial court, who saw the plaintiff and his injuries, refused to reduce the verdict. Under these circumstances, and under such showing of injury, we cannot hold that the verdict was excessive.

The appellant has raised two or three other questions which we have duly considered, but we do not find merit in them.

Judgment affirmed.

HOLCOMB, C. J., MOUNT, TOLMAN, and FULLERTON, JJ., concur.

[No. 15455. Department Two. January 2, 1920.]

SUPREME ASSEMBLY OF UNITED ARTISANS, *Plaintiff*, v. IVA JOHNSON, *Respondent*, HILMA POWERS *et al.*, *Appellants*.[1]

INSURANCE (207)—MUTUAL BENEFIT INSURANCE—BENEFICIARIES—DESIGNATION—BY-LAWS—EFFECT. Where the by-laws of a mutual benefit insurance company gave the insured the right to select his beneficiary within certain restrictions, and he did so in his application by naming his wife, and his two children and in the event of her death, there being no stipulation against alternate or secondary beneficiaries, the subsequent issuance of the certificate containing the name of the wife only was not a rejection of the children as beneficiaries upon the death of the wife; and in such case, upon the member's remarriage, the children are the beneficiaries to the exclusion of the second wife, notwithstanding a subsequent by-law provided that, in the event of the death of the beneficiary before the death of the member, if no other designation has been made, the benefits shall be paid to the "widow."

SAME (207). A by-law of a mutual benefit association which provided that, in the event of the death of the beneficiary before the death of the member, the benefits shall be paid to the widow, "if no other designation has been made," refers to a designation by the member in his lifetime, either before or after the death of the beneficiary named in the certificate.

SAME (196)—BY-LAWS—RULES AND CUSTOMS—EFFECT. A mere custom or office rule of a mutual benefit insurance company not to issue certificates in which alternate or secondary beneficiaries are named, not brought home to the member's knowledge, are not binding upon him, if not incorporated in or made part of its printed matter distributed to members.

Appeal from a judgment of the superior court for Clarke county, Back, J., entered December 13, 1918, upon findings in favor of a certain claimant to a fund in court, in an action in interpleader. Reversed.

McMaster, Hall & Drowley, for appellants.

Bates & Burnett, for respondent.

[1]Reported in 186 Pac. 1065.

TOLMAN, J.—On February 5, 1896, John W. Johnson made a written application for membership in the United Artisans, a fraternal benefit society, in which he directed that, at his death, the benefits should "be paid to Mary C. Johnson, and in case of her death, to Anna M. and Hilda C. Johnson, related to him as wife and children." On February 10th following, the society issued to Johnson a benefit certificate in which Mary C. Johnson, the wife, was alone named as beneficiary, and in which there was no provision for the disposition of the fund in the event that the beneficiary named should die before her husband. At the time of making the application and the issuance of the benefit certificate, there was no by-law or other regulation of the society providing for the disposition of the benefit funds in the event of the death of the beneficiary named, prior to the death of the member; but thereafter on January 1, 1903, a by-law became effective, which, so far as is here material, provides:

"In the event of the death of the beneficiary named in his certificate of membership before the death of such member, if no other designation has been made, the benefits shall be paid to the widow."

In 1906, Mary C. Johnson died, and in 1907, John W. Johnson was married to respondent, who became his widow upon his death in 1918. After Johnson's death, the society determined that there was due to his beneficiary, or beneficiaries, $1,488, and as this was claimed by respondent, as his widow, under the by-law referred to, and also by the appellants, the daughters, under the designation contained in the application, the society began this action in interpleader, and paid the money into court. The trial court found in favor of respondent, and entered its judgment discharging the society from all liability, allowing it costs and directing that the fund be paid to respondent as the widow,

and denied the daughters any interest therein. This appeal is from that part of the judgment which denies the appellants' rights and awards the fund to respondent.

The society, by by-law, limits the member's right to select his beneficiary to certain named relatives and dependents, and then provides, "within the above restrictions, each member shall have the right to designate his beneficiary, and from time to time, have the same changed in accordance with the laws, rules and regulations of the society," etc., and it seems apparent that who, within such designated classes, shall be so named by the member is a matter of no concern to the society, and that the only contract in that respect between the society and the member is that the beneficiary named shall be within the restrictions referred to.

"The power of appointment of beneficiaries (within the classes recognized by statute) rested exclusively with the member, as much so as his power to name legatees or devisees in a will, and the rule of construction of wills may very well be applied to the construction of a certificate; that is to say, the intention of the member is the controlling element. 1 Bacon on Benefit Societies, Sec. 255; *Union Mut. Ass'n v. Montgomery,* 70 Mich. 587; *Duvall v. Goodson,* 79 Ky. 224." *Dennis v. Modern Brotherhood of America,* 119 Mo. App. 210, 95 S. W. 967.

If this be so, then the society has no right to reject any beneficiary named by the member, who is within the limits of eligibility.

The contract between the member and the society consisted of the application for membership, the certificate of membership, and the laws, rules and regulations of the order, and, in a general sense, the application may be regarded as an offer to contract, and the certificate of membership as an acceptance of that

offer; but in this case the offer was made in the light of the by-law already referred to, which, after the fixing of the eligible classes, gave the member an absolute right to designate his beneficiary, stipulating only that such beneficiary should be eligible under the by-law, and therefore, children of the member being eligible, and there being no stipulation against naming alternate or secondary beneficiaries, there was nothing in the application under this head for the society to accept or reject, and the subsequent issuance of the certificate containing the name of the wife only as beneficiary was not, and could not have been, a rejection of the children as beneficiaries to take in the event of the death of the wife. *Eckler v. Terry,* 95 Mich. 123, 54 N. W. 704; *Derrington v. Conrad,* 3 Kan. App. 725, 45 Pac. 458.

But it is contended that the by-law which became effective January 1, 1903, hereinbefore quoted, should be read as though the words "thereafter" or "subsequently" were written into it, so as to require the member, after the death of the beneficiary named in the certificate, to designate another in order to defeat its operation. The words, however, "if no other designation has been made," taken in their commonly accepted meaning, plainly refer to any designation made by the member in his lifetime, either before or after the death of the beneficiary named in the certificate, and no good reason is presented why, by construction, we should restrict them to a narrower meaning.

It is further contended that, as testimony was introduced by an official of the society to the effect that it was the custom of officers of that society to write the name of but one beneficiary into the certificate and not to issue certificates in which alternate or secondary beneficiaries were named, such custom became a part

of the laws, rules and regulations of the society which were binding upon the member; but, apart from the testimony of the same witness to the effect that such custom was never called to Mr. Johnson's attention, we think the laws, rules and regulations which are binding upon a member of such a society do not include mere customs or office rules designed to expedite its business, which are not incorporated in and made a part of its printed matter distributed to applicants and members to advise them of their rights and liabilities. *Walsh v. Aetna Life Ins. Co.*, 30 Iowa 133, 6 Am. Rep. 664.

It must be borne in mind that the member, Johnson, originally made his application for membership designating his daughters as beneficiaries to take the fund in the event of the death of his wife; that this application and designation were at all times in the office of the society as a part of its records, and that Johnson took no steps to change this situation, although he had remarried, and we must presume that it was his intention that the daughters should receive the money. Had he not remarried, his intention that his daughters should take would not have been questioned by any one, yet his remarriage had no effect whatever upon the designation theretofore made.

We conclude that that part of the judgment from which the appeal is taken must be reversed, with instructions to enter a judgment in harmony with the views herein expressed.

Judgment reversed.

HOLCOMB, C. J., MOUNT, BRIDGES, and FULLERTON, JJ., concur.

[No. 15530. Department Two. January 2, 1920.]

CHARLES W. SEWELL, *Respondent*, v. LILLIAN SEWELL *et al.*, *Appellants*.[1]

TRUSTS (19)—PAROL EVIDENCE TO ESTABLISH—WEIGHT AND SUFFICIENCY. The evidence to establish a trust by parol must be clear, cogent and convincing, and is insufficient, where, in a controversy between mother and son over the conduct of a business owned by them, their testimony was conflicting and indicated that a transfer of capital stock and real estate by the son to the mother was either upon consideration of the assumption of liabilities which were subsequently paid, or to avoid any judgment third parties might obtain against him.

Appeal from a judgment of the superior court for King county, Jurey, J., entered April 5, 1919, upon findings in favor of the plaintiff, in an action to establish a trust, tried to the court. Reversed.

Kerr & McCord and *Stephen V. Carey*, for appellants.

Alexander & Bundy, for respondent.

MOUNT, J.—The object of this action was to have certain real estate and certain shares of stock of the Pacific Coast Stamp Works, held by the defendant Lillian Sewell, declared to be held by her in trust for the plaintiff. Upon issues joined, the case was tried to the court, and at the conclusion of the evidence, the trial court found that the real estate and shares of stock were held in trust by the defendant for the benefit of the plaintiff. The defendant Lillian Sewell has appealed from that judgment.

The controlling facts may be briefly stated as follows: All the stock of the Pacific Coast Stamp Works, a corporation, was held by the respondent and his mother, the appellant. The capital stock of this cor-

[1]Reported in 186 Pac. 289.

poration was divided into two hundred shares, of which the respondent held sixty-nine shares and his mother one hundred and thirty-one shares. Up to December the 10th, 1914, the business of the corporation in Seattle had been managed entirely by the respondent. He had unlimited access to the cash and all the business of the corporation. About that time the respondent had permitted bills of the corporation to remain unpaid, had spent more money than his salary in fast living, and his mother had been informed that he was about to be sued. Thereupon, on the 10th day of December, 1914, he transferred, by an assignment reciting that the transfer was for a valuable consideration, sixty-eight shares of his stock to his mother. His version of this transfer, as related in the abstract of the record, is as follows:

"Regarding the transfer of the stock, she discovered that I was keeping company with a woman of whom she had not approved. One thing led to another and there was considerable discussion about it. She repeated gossip she had heard. She informed me that, as this woman could not get any more money out of me, she was going to sue me, and mother suggested that, for the benefit of the business, I had better turn my stock over to her and let her keep it until the thing had blown over. When mother said this woman could not get any more money out of me she meant I had been spending all my salary and what other money I could get my hands on for this woman. Prior to this transfer of stock nothing was done about shutting off my financial supply. Shortly after this trouble mother arranged to countersign the checks. I transferred the stock to her, as she suggested, to keep peace in the family. I continued to manage the business with no change except mother countersigned the checks."

His mother's version of the transfer was substantially to the effect that at this time, on account of her son's extravagance, the financial condition of the cor-

poration was approaching insolvency; that she told her son she had put all the money in the business that she was going to put into it; that she would not put any more money into it unless the management of the business was changed; that he thereupon agreed to transfer to her all his shares except one share, in consideration that she assume the obligations and liquidate the debts of the corporation. The evidence shows that, at about this time, she employed a bookkeeper whose duty it was to assist her son in the management of the company; that her son was not permitted to draw any checks; that she was required to countersign all checks drawn by the corporation; that afterwards the business of the company was conducted in that way until it finally paid all the debts that were owing. The business of the company thereafter seemed to prosper. The record shows that, soon after the transfer of these shares of stock, the interest of the respondent in certain real estate was deeded to his mother. She had nothing to do with the transfer. She says she paid no consideration for the deed; she did not know it was being transferred to her until after the deed had been made and recorded and returned to her by direction of her son. She testified that, after the title was placed in her name, she paid some five hundred and thirty dollars of debts of her son on account of this real estate.

In August of 1918, some dispute arose between the respondent and his mother in regard to a sale of part of the business. The respondent claimed an interest therein, which she denied. The respondent thereupon, without informing his mother, drew and cashed a check for some six hundred and fifty dollars and disappeared. He was gone from the city for about six weeks. From that time until the trial of this case in March of 1919, the appellant did not see her son. In

the meantime he brought this action against her. Many other facts were shown in the testimony at the trial regarding the manner in which the Pacific Coast Stamp Works had been built up; how the mother had furnished the money and the son and managed the business for a long period of years. But this, we think, is entirely immaterial to the issue. The principal and real issue in the case is whether or not this stock and this real estate were transferred to the mother in trust to be held by her until demanded by her son. The respondent alleges that they were so held. The appellant vigorously denies that there was any trust. We think the evidence on the part of the respondent is not sufficient to show that there was any trust agreement. He says he transferred the stock to his mother at his mother's request in order to keep peace in the family, or words to that effect. The inference to be drawn from his whole testimony is that his mother was dissatisfied with his conduct; that, in order to prevent some other person from acquiring the stock by means of suit or otherwise, she insisted that he transfer the stock to her. Her reason for the transfer of the stock is somewhat different; but we are satisfied, from the whole record, that the stock was transferred by the respondent to his mother either to put it out of his hands, so as to avoid any judgment which might be had against him by third parties, or it was transferred for some consideration. In either event, there can be no recovery. This court has held, in common with other courts, that, in order to establish a trust by parol, the evidence must be clear, cogent and convincing. *Denny v. Holden,* 55 Wash. 22, 103 Pac. 1109; *Adley v. Pletcher,* 55 Wash. 82, 104 Pac. 167; *Herriford v. Herriford,* 78 Wash. 429, 139 Pac. 212.

The respondent asserts that he transferred the stock to his mother in order to keep peace in the family.

The mother's version is different. She claims that it was transferred for a consideration, namely, that she should assume the obligations and keep the business going. But in either event there is no clear, cogent or convincing evidence that a trust of any kind was created by the transfer. It appears that, after the transfer had been made, the appellant desired some money and her son suggested that a dividend be declared of something over nine hundred dollars. He testified that a dividend was declared; that he credited himself with one-half thereof and his mother with the other half, but that she obtained all of the money. It is argued by the respondent that this is evidence of the fact that the stock was held in trust by the mother. Conceding this to be a circumstance, it is a very slight one. It does not furnish clear and convincing evidence of a trust. We have carefully read the abstracts of the evidence in the case and are convinced that there is not sufficient evidence that these parties, at the time the transfers were made, intended that the appellant should hold either the real estate or the stock of the corporation in trust to be delivered up to the respondent upon demand. We think the trial court was in error in so holding.

The judgment is therefore reversed, and the cause remanded with instructions to dismiss the action.

HOLCOMB, C. J., BRIDGES, and FULLERTON, JJ., concur.

[No. 15647. Department One. January 2, 1920.]

W. H. FISHER, *Respondent*, v. SEATTLE TRUST COMPANY *et al.*, *Respondents*, SCHWABACHER HARDWARE COMPANY, *Appellant*.[1]

APPEAL (232)—STAY—RIGHT TO AND NECESSITY OF SUPERSEDEAS. A judgment directing the payment of a fund in court which might be enforced by execution can be stayed only by the taking of an appeal and the giving of a supersedeas bond, in the absence of which it is entitled to the same respect as if all right of appeal had expired or been abandoned.

TRUSTS—EXECUTION OF TRUST—PAYMENT OF JUDGMENT. A trustee distributing a fund under a decree of court is indemnified by the order and needs no release.

APPEAL (232, 244)—SUPERSEDEAS—RESTITUTION. Pending an appeal taken after payment of a judgment distributing a fund in court to solvent parties, the supreme court will not require the trustee to make restitution to an appellant who was amply protected by Rem. Code, § 1742, authorizing restitution after final decision on the appeal.

Application filed in the supreme court November 24, 1919, for an order requiring the deposit in court of a trust fund, pending appeal from the judgment directing disposition thereof. Denied.

M. H. Van Nuys, for respondents and appellant.

Wright, Kelleher, Allen & Hilen, for respondent Fisher.

MITCHELL, J. — The Seattle Trust Company admittedly held in trust the legal title to certain real estate in King county, Washington, for the benefit of certain judgment creditors of Benjamin Moyses *et al.* W. H. Fisher, one of these creditors, instituted an action in the superior court of King county against

[1]Reported in 186 Pac. 649.

the trustee, other creditors and parties in interest, to have the real estate sold and the proceeds divided. Such proceedings were had that the property was sold, and thereupon, among others, Fisher, the Seattle Trust Company, and Schwabacher Hardware Company, each appearing by his attorney of record, a decree was entered on July 29, 1919, dividing the fund of $5,163.93 by adjudging that the plaintiff, Fisher, have and recover from the Seattle Trust Company the sum of $5,006.31, and that the defendant Schwabacher Hardware Company have and recover of the Seattle Trust Company the sum of $157.62. On the next day, July 30, 1919, the Seattle Trust Company, in good faith and in obedience to the judgment, paid W. H. Fisher said sum of $5,006.31, and mailed its check for $157.62 to Schwabacher Hardware Company. Thereafter, in the month of October, Schwabacher Hardware Company gave its written notice of appeal from the judgment of July 29, 1919, and filed the same, together with an appeal and supersedeas bond. The appeal has not yet been presented to this court. Promptly, the Seattle Trust Company made demand upon Fisher for the return of the money paid to him, that it might be held to abide the result of the appeal. The demand was refused; and in this connection it appears that Fisher was himself acting as a trustee for others in making the collection and that, on the day he received the money, he at once paid it to the parties entitled to it.

Upon the theory that, by the provisions of § 1731, Rem. Code, upon giving notice of appeal and the filing of the bond to render it effectual, this court acquires jurisdiction of the appeal for all necessary purposes, the Seattle Trust Company, by a noticed motion and petition, has applied for an order requiring Fisher to deposit here or in the superior court said sum of $5,-

006.31 to be held subject to the result of the appeal. No objection seems to have been made by any one to the form of the judgment entered in the superior court in that, in legal effect, it justified the Seattle Trust Company to at once pay the amounts ordered to be paid or, at its own risk, suffer an execution against it. Any party aggrieved, in order to protect himself, could, at the time the judgment was rendered, have given notice in open court of an appeal and made it effectual by the filing of an appeal and supersedeas bond as the statute provides for. There is no warrant, under the statutes of this state, for impounding a fund in court after judgment directing its payment, except upon the giving of a supersedeas bond, which is intended, among other things, to protect a successful litigant from the loss of interest while he is kept out of the use of his money. Counsel for respondent Fisher calls attention to the absence of any showing by the Seattle Trust Company that either he or the beneficiary to whom he paid the collection is insolvent, and that, on the contrary, there is an undenied affirmative showing that each of them is entirely solvent, and that therefore the Seattle Trust Company is amply protected by the provision of Rem. Code, § 1742, authorizing a writ of restitution to restore money or property taken under a judgment appealed from, if by a decision of the supreme court the appellant becomes entitled thereto.

Counsel for petitioner, relying on § 474, vol. 2, Perry on Trusts (6th ed.), and *Gottschalk v. Mercantile Trust & Deposit Co.*, 102 Md. 521, 62 Atl. 810, says:

"Where a court of equity assumes jurisdiction to execute a trust, the trustee can act only under the direction of the court. Hence the trust fund is in the custody of the court."

The rule is sound, and here the trustee did act under the direction of the court, whereupon the applicability of another rule, viz.:

"Where the trustee pays and distributes the trust fund under the direction and decree of the court, he is indemnified by the order itself, and needs no release. It would be impossible to hold any trustee responsible for obeying the orders of a court." 2 Perry, Trusts (6th ed.), § 924.

So that, when the judgment of the superior court was entered, all previous rights of the parties became merged in the judgment, which gave directions for the disposition of the funds. It then became the duty of the Seattle Trust Company to carry out the terms and provisions of the judgment. The judgment was perfectly valid and enforceable, and, at the time the money was paid to Fisher, the judgment was entitled to the same respect and confidence as if all right of appeal had expired or been abandoned, or the judgment had already been affirmed upon appeal.

Application denied.

HOLCOMB, C. J., MAIN, and PARKER, JJ., concur.

[No. 121. *En Banc.* January 3, 1920.]

In the Matter of the Proceedings for the Disbarment of A. B. WILTSIE.[1]

ATTORNEY AND CLIENT (7)—DISBARMENT—GROUNDS. An attorney who solicited the employment of claiming exemptions for persons subject to the selective service act and encouraged and assisted in the preparation of false affidavits and filing false claims of exemption is guilty of moral turpitude warranting his disbarment.

Proceedings filed in the supreme court February 25, 1919, for the disbarment of an attorney, upon the findings of the state board of law examiners against the accused. Judgment of disbarment.

A. B. Wiltsie, for accused.

The Attorney General, and *R. M. Burgunder, Assistant,* for the state.

MACKINTOSH, J.—The state board of law examiners, upon testimony taken in this matter, recommended the disbarment of A. B. Wiltsie for unprofessional conduct in the preparation of questionnaires and claims of exemption under the selective service act. Without reviewing the testimony in detail, it is enough to say that it shows Wiltsie solicited the employment of claiming exemptions for persons subject to the operation of the selective service act, and suggested, encouraged and assisted in the preparation of false affidavits looking to the improper exemption of his clients.

The board also found, as one of the grounds for his disbarment, that the charges made for these services were excessive. We do not feel like depriving a practitioner of his right to continue his profession on a question as debatable as the propriety of the amount of a fee. Such a question is so much a matter of in-

[1]Reported in 186 Pac. 848.

dividual opinion that it should not be the basis for disbarment except in the most aggravated and extreme case. So far as the record discloses, the fees were voluntarily paid, and were it the only charge here that such fees were excessive, the extreme penalty would not be merited.

The charges of solicitation of business, however, and the filing of false claims of exemption are so well proved and so flagrantly unethical, as well as disloyal, as sufficiently to evidence that degree of moral turpitude unfitting the practitioner to continue the practice of law in this state. For that reason, the recommendation of the board is adopted, and an order is hereby made disbarring A. B. Wiltsie from the practice of law in the state of Washington.

All concur.

[No. 15443. Department Two. January 3, 1920.]

RAY WALMSLEY, *by his Guardian ad litem, etc., Appellant,* v. W. B. PICKRELL *et al., Respondents.*[1]

MUNICIPAL CORPORATIONS (383)—COLLISION—CONTRIBUTORY NEGLIGENCE—VIOLATION OF ORDINANCE. In an action for injuries sustained in a collision at a street intersection, findings for defendant on conflicting evidence are sustained where his evidence is clear and indicated that he was driving carefully on the left side of the street and was run into by the defendant's motorcycle, which was exceeding the speed limit and not as near the curb as the ordinance required, and if it had been nearer the curb, the collision would have been avoided.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered February 10, 1919, upon findings in favor of the defendant, in an action for personal injuries, tried to the court. Affirmed.

[1]Reported in 186 Pac. 847.

A. O. Colburn, for appellant.

Plummer & Lavin, for respondents.

FULLERTON, J.—The appellant, as plaintiff, brought this action against the respondent to recover for personal injuries and for injuries to a motorcycle owned by him, received in a collision between the motorcycle and an automobile driven by the respondent. The trial was had by the court sitting without a jury, and resulted in a judgment in favor of the respondent.

The appellant assigns errors which, if supported by the record, might entitle him to a new trial, but as he asks for an affirmative judgment in his favor in this court and directs his argument solely to the weight of the evidence, these assignments need not be specially considered.

The parties are widely divergent as to the circumstances giving rise to the collision. It occurred at the junction of two streets, in the city of Spokane, which cross each other at right angles. It is the appellant's version that he was riding east on one of the streets, traveling in a straight line to the right of its center, and had passed the center of the cross-street when he discovered the respondent approaching directly upon him from the north at a very rapid rate of speed; that he attempted to avoid a collision by turning his motorcycle to the right, but did not succeed in getting out of the way, and was struck head-on by the respondent's automobile. The respondent's version is that he (the respondent) was driving south on one of the streets mentioned, well toward the curb on his right; that, as he approached the street, he saw an automobile coming up the cross-street from his right and slowed up for it to pass in his front; that, as this one passed, he discovered another approaching from the same direction and waited for this one also, his machine being then

going at the rate of about six miles an hour; that, as the second machine passed, he entered the street and was well towards the center of the cross-street when the appellant rode up rapidly from his right; that he saw there was danger of a collision, and to avoid it turned the wheels of his automobile to the left as far as the steering gear would permit, when the appellant's motorcycle struck his automobile a glancing blow on his right fender, tearing it loose and striking his right front wheel, finally catching and hanging on the spring on that side of his car. Each of the parties was able to bring to his support corroborating evidence, such as marks upon the pavement, the nature of the injuries to the machines, and their positions after the accident, and the appellant produced an eyewitness, also, who in some degree supported him in his contention. It is on the latter circumstance, and another presently to be noticed, that the appellant contends that the evidence preponderates in his favor. But, if we have correctly gathered the surroundings, the position of the eyewitness from which he saw the accident was not such as to give him any very accurate view of the situation, and his testimony indicates, also, that he was giving attention to another matter which absorbed him for the time being. We cannot, therefore, conclude that the evidence of this witness materially aids the appellant.

The other circumstance is the manner in which the respondent testified. The appellant, in his brief, quotes largely from this testimony and argues its inherent improbability. But while the respondent was somewhat verbose, and in the course of his testimony drew deductions from the facts he recited which were probably the province of the trier of the facts to draw, his testimony as to the surrounding conditions and as to the manner in which the accident happened is clear, and it seems

to us no more inherently improbable than is the version given by the appellant.

In addition to finding that the weight of the evidence was with the respondent, the trial court took the view that, if the appellant's version were to be accepted, he was guilty of contributory negligence. By his own testimony he was, at the time of the collision, violating the city's ordinances enacted to regulate traffic upon its streets. He was traveling in excess of the speed limit permitted at that place and was not traveling as near the right-hand curb of the street as the ordinance required. It is possible, if he was proceeding in the manner he stated, that the first of these conditions did not contribute to his injury, and, if so, it would not bar a recovery on his part, but it is not so clear as to the second. He was, it is true, on the right of the center of the street, but he needed but an instant more of time to have passed the automobile in the clear, and he would have had this time had he traveled closer to the curb.

On the whole, we are unable to say that the judgment is not in accord with the record. It will therefore stand affirmed.

HOLCOMB, C. J., MOUNT, TOLMAN, and BRIDGES, JJ., concur.

[No. 15473. Department Two. January 3, 1920.]

AMANDA NEELY *et al.*, *Respondents*, v. THE CITY OF SEATTLE, *Appellant.*

MICHAEL DOLAN *et al.*, *Respondents*, v. THE CITY OF SEATTLE, *Appellant.*[1]

MUNICIPAL CORPORATIONS (566, 567)—CLAIMS—SUFFICIENCY—VARIANCE. Under a claim against a city for overflowing certain described tracts of land, damages to other lands cannot be recovered, in view of the city charter requiring all claims to contain the items of damages and to accurately describe the injury, as a prerequisite to action.

SAME. Under a claim against a city for overflowing all of plaintiffs' lands, recovery may be had for damages to only part.

WATERS AND WATER COURSES (72)—ACTION FOR FLOWAGE—ACT OF GOD—EVIDENCE—SUFFICIENCY. Where floods are not unprecedented, and higher floods had occurred in prior years, they are not within the rule of nonliability as acts of God.

Appeal from judgments of the superior court for King county, Tallman, J., entered May 9, 1919, upon the verdict of a jury rendered in favor of the plaintiffs, in consolidated actions in tort. Affirmed as to respondents Dolan; reversed as to respondents Neely.

Walter F. Meier and *Edwin C. Ewing*, for appellant.

Revelle & Revelle (*Lucas C. Kells*, of counsel), for respondents Neely.

Walter A. Keene, for respondents Dolan.

MOUNT, J.—These two actions were brought by the plaintiffs independently, to recover damages from the city of Seattle by reason of the alleged negligence of the city in permitting the waters of White river to flow upon the lands of the plaintiffs. After issues were joined, the two cases were consolidated for the

[1]Reported in 186 Pac. 880.

purpose of trial and were tried to the court and a jury. The result was a verdict and judgment in favor of the plaintiffs Dolan for the sum of $1,541.25, and for the plaintiffs Neely in the sum of $8,220. The city has appealed from these judgments.

So far as this appeal is concerned, the facts may be briefly stated as follows: The city of Seattle owns a tract of land in section 14, township 22, range 4. The White river flows along the southwestern corner of this tract. Between the river and this tract of land a dike was constructed, many years ago, so as to prevent the flood waters of White river from flowing over the adjacent lands. This dike has been used for many years as a county road. It is fourteen feet in width on the surface and thirty to forty feet wide at its base. The flood waters of White river have never been known to overflow this dike. To the north of the city's property are several tracts of land owned by the respondents. In June of 1917, the city found it necessary to dispose of sewage from various buildings upon the city farm, and for that purpose constructed a four-inch tile drain pipe from the city farm buildings through, under and across the dike road adjacent to the city farm. This pipe was laid through and under the dike road in a tunnel, so as to discharge the sewage into White river. It is alleged in the complaint that this sewer was negligently constructed through the dike, and that, when the waters of White river arose, these waters washed out the tunnel and the dike, so that the waters of the river were permitted to flow in and upon the respondents' property, to their great damage. In December of 1917, there occurred in the White river valley a succession of floods. When the floods came, the waters cut through the tunnel and washed out through the dike a channel more than one hundred feet wide, so that the respondents' property

was flooded and great quantities of sand and debris were deposited thereon. This flood occurred between the 14th and 28th of December of that year.

On the 25th of January, 1918, the respondents Neely filed with the proper officials of the city of Seattle a claim for damages alleged to have been occasioned to their property by reason of the negligent construction of the tunnel and drain. They described by metes and bounds five separate tracts of land claimed to have been damaged. We deem it unnecessary to set out the long descriptions in these notices and will designate these tracts by numbers, as they are designated in the briefs here on appeal. The first tract, which is numbered 1, contained 9.28 acres; the second tract, numbered 2, contained 6.47 acres; the third tract contained 27.43 acres. With this claim was also filed a blueprint showing the location of these different tracts. On January 28th, the respondents Neely filed another claim, describing by metes and bounds two other tracts, which may be referred to as tracts 4 and 5. These descriptions covered, in the aggregate, a tract of land lying north of the city's property containing something over forty acres. Between these tracts and the city property were three other tracts of land, referred to as tracts 7, 8 and 9, which were not described in any of the claims. On the 24th of January, 1918, the respondents Dolan filed with the proper officials of the city of Seattle a claim for damages to land owned by them. This description was also by metes and bounds and included tracts 1, 2, 4 and 5, described in the Neely claim, and an additional tract, designated as tract 6, lying between the tracts described as 1, 2, 4 and 5. So that the claims presented to the city by the Neelys and Dolans duplicated tracts 1, 2, 4 and 5. When the action was brought by the Neelys, they described the lands in their complaint the same as they

were described in the claim of damages filed with the city previously. Thereafter, and before the city answered, an amended complaint was filed by the Neelys, in which amended complaint damages were claimed for the three tracts numbered 7, 8 and 9, lying between the city property and the properties described in the claims by the Dolans and the Neelys. No claim for damages on account of the injury to these tracts, 7, 8 and 9, was ever presented to the city. Upon the trial of the case, the court permitted evidence to go to the jury showing damages to these tracts, 7, 8 and 9. This evidence was objected to by the appellant at the time, and at the close of the case, counsel for the city requested the court to strike all the evidence relating to these tracts from the consideration of the jury. This the court denied.

The principal error relied upon by the appellant is that the court erred in receiving any evidence as to damages to these tracts 7, 8 and 9, for the reason that no claim for damages was filed in time with the city on account of these tracts. Section 29, art. IV, of the charter of the city of Seattle is as follows:

"All claims for damages against the city must be presented to the city council and filed with the clerk within thirty days after the time when such claim for damages accrued, . . . All such claims for damages must accurately locate and describe the defect that caused the injury, accurately describe the injury, give the residence for one year last past of claimant, contain the items of damages claimed, and be sworn to by the claimant. No action shall be maintained against the city for any claim for damages until the same has been presented to the city council and sixty days have elapsed after such presentation."

Section 7995, Rem. Code, provides:

"Whenever a claim for damages sounding in tort against any city of the first class shall be presented

to and filed with the city clerk or other proper officer of such city, in compliance with valid charter provisions of such city, such claim must contain, in addition to the valid requirements of such city charter relating thereto, a statement of the actual residence of such claimant, . . .''

This court has held that these provisions of the charter and the statute apply to all claims for damages against such cities. In the case of *Casassa v. Seattle,* 75 Wash. 367, 134 Pac. 1080, we said:

''Art. 4, § 29 of the charter of Seattle requiring the presentation to the city council and filing with the clerk of all claims for damages against the city within thirty days after such claims accrued, provides that the notice of claim shall 'contain the items of damages claimed.' For the full text of this charter provision and the character of claims which have been held to be included within its purview, reference is made to the following decisions: *Jurey v. Seattle,* 50 Wash. 272, 97 Pac. 107; *International Contract Co. v. Seattle,* 69 Wash. 390, 125 Pac. 152; *Id.,* 74 Wash. 662, 134 Pac. 502; *Cole v. Seattle,* 64 Wash. 1, 116 Pac. 257, Ann. Cas. 1913A 344, 34 L. R. A. (N. S.) 1166. Under these decisions, the presentation and filing of the claim was an indispensable prequisite to the maintenance of this action. They unequivocally hold that the charter provision applies to all claims for damages.''

See, also, *Willett v. Seattle,* 96 Wash. 632, 165 Pac. 876.

It is argued by the respondents Neely, in substance, that the object of filing this claim with the city council is to give notice of the damages claimed; and because this court in a number of cases has held that a liberal construction should be placed upon these statutes—as in *Ellis v. Seattle,* 47 Wash. 578, 92 Pac. 431, and *Wagner v. Seattle,* 84 Wash. 275, 146 Pac. 621, Ann. Cas. 1916E 720—that, when there was no evident in-

tention to mislead, but a *bona fide* attempt to comply with the law, the notice is sufficient, in the absence of any evidence that it did in fact mislead. Those were cases where an attempt was made to describe a particular place. That rule does not control the facts here. In this case the respondents Neely filed a claim in which they described certain of their lands as being damaged. These lands were described definitely by metes and bounds. Other parts of their lands which had been covered by water were not included within the description and no claim for damages was made on that account. If the respondents Neely, in filing their claim with the city council under these provisions of the statute and of the city charter, had described all their lands and claimed that all thereof had been damaged, as was done in the claim filed by the Dolans, we have no doubt that would have been sufficient notice to the city, and the respondents Neely might then have proved all the damages which all their lands had been subjected to. But when they select out certain specified tracts described by metes and bounds, and where, as here, a blueprint is filed showing the exact location of these lands upon which damages are claimed, they are bound by that claim. They may not afterwards show that other lands were also damaged and recover therefor. These claims were for the purpose of notice to the city. The city had a right to rely upon the claims as filed as being the whole claim for damages, and was not bound to take notice that other lands belonging to the claimants were also damaged when no claim was made therefor. We think it is too plain for argument that, under the decisions of this court which hold that these claims are a prerequisite for maintaining an action, damages not claimed in such notice may not be demanded. *Wagner v. Seattle, supra.*

It will not do to say that damages to lands other than those claimed in the notice may be proven upon a trial where only specific lands are claimed in the notice to have been damaged. We are satisfied, therefore, that, in the Neely case, the trial court erred in receiving evidence of damage to tracts 7, 8 and 9, and in submitting that evidence to the jury. The court, upon the motion of the appellant, should at least have stricken out all the evidence relating to damages to these tracts of land, because they were not referred to in the claim of damages filed with the city under the provisions of the city charter and the statute above referred to. The claim of the respondents Dolan does not fall within this rule, because in the description of their lands they included the whole tract which they said was damaged. As a matter of fact, the whole tract was not damaged, but a part thereof was damaged, and the part that was damaged was included within the whole tract. That was notice to the city that the respondents Dolan intended to rely upon the damage to the whole tract. The opposite is true with reference to the Neely tract.

Appellant further argues that the court erred in its instructions to the jury. We think there is no merit in this contention. We have carefully read the instructions to the jury and are satisfied that they state the law of the cases. The instructions were long and it would be of no assistance to the court, upon a retrial, to enter into a detailed discussion of the alleged errors. They are not of sufficient importance to justify further consideration.

When the cases were submitted to the jury, and after verdict, the appellant moved the court for a judgment *non obstante,* because there was not sufficient evidence to go to the jury. It is argued, in regard to this point, that the evidence showed that the floods in

the White river at the time of these damages were unprecedented floods, and were therefore the act of God. We find abundant evidence in the record to the effect that these were not unprecedented floods; that higher floods had occurred in prior years; and, of course, if these floods were not unprecedented, it follows that they were not within the rule of that commonly known as an act of God. Furthermore, the court properly instructed the jury upon this question and the jury evidently found that these floods were not unprecedented.

For the reasons hereinabove stated, the judgment in favor of the Neelys is reversed and remanded for new trial, and the judgment in favor of the Dolans is affirmed.

HOLCOMB, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

[No. 15549. Department Two. January 3, 1920.]

J. R. Ross *et al., Respondents,* v. MARY ROSE, *Appellant.*[1]

HIGHWAYS (55, 58) — USE FOR TRAVEL — FRIGHTENED ANIMALS — QUESTION FOR JURY. Whether there was compliance with Rem. Code, § 5562-27, as to the duty of an automobile driver on approaching frightened animals, is a question for the jury, where there was evidence that the auto approached a frightened horse upon a dangerous approach to a bridge, at a high rate of speed and making a great noise, causing the horse to plunge off the embankment.

SAME (58)—CONTRIBUTORY NEGLIGENCE. Whether a horse that became frightened at an automobile was known by defendant to be unsafe to drive, is a question for the jury, where it appeared that he had frequently driven it in automobile traffic and had passed automobiles safely in the same place, although once some months before it had turned around with him.

SAME (59)—INSTRUCTIONS. In an action for injuries sustained through the frightening of plaintiffs' horse in the negligent driving

[1]Reported in 186 Pac. 892.

of an automobile at great speed making a great noise, it is proper to refuse to instruct that plaintiffs' failure to signal defendant, as provided in Rem. Code, § 5562-27, was contributory negligence precluding a recovery, since the signal is called for only when a full stop is required, and the statute made it the positive duty of the defendant to exercise precaution to prevent frightening the horse.

NEW TRIAL (24)—GROUNDS—WEIGHT OF EVIDENCE. The fact that the trial court may have considered an award inadequate is not ground for granting the defendant a new trial.

Appeal from a judgment of the superior court for Columbia county, Miller, J., entered March 21, 1919, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by the driver of a horse frightened by defendant's automobile. Affirmed.

Leon B. Kenworthy, for appellant.

Will H. Fouts and *Gose & Crowe,* for respondents.

TOLMAN, J.—This is an action for personal injuries. From a verdict and judgment for $500 in favor of respondents, the case is brought here on appeal. It appears that, on December 8, 1917, respondents were driving one horse, hitched to a single buggy, along the public road on their way from Dayton to their home. As they crossed the bridge over the Touchet river and drove onto the approach or fill on the far side, they saw appellant's automobile rapidly approaching them around a bend in the road, some three hundred or four hundred feet distant. They allege in their complaint, and testify, that the automobile was coming at such a high and excessive rate of speed as to constitute negligent and reckless driving, especially so since they were on the narrow approach to the bridge, not exceeding twenty feet in width, with a sheer drop of some four or five feet on either side, with no railing or barrier to prevent horse and vehicle from going over the edge. Both respondents testified

that the automobile was not seen by them until they had passed off the railed-in bridge onto the unrailed approach; that it was then distant from them about 110 steps, and that it did not stop or slacken in speed until after it had passed them and the accident had occurred; that, about the instant they saw the automobile, the horse they were driving threw up its head, began to shy, and the husband was fully occupied all the time in keeping a firm hold on the reins and trying to control the horse; that the horse and buggy advanced about their length in the time intervening between when they first saw the car and the happening of the accident; that, as the car approached, it made "a terrible racket," and when it was still distant, as she estimated, thirty feet, the wife threw up her hands and cried "whoa," but the car came on with undiminished speed and noise and the horse, still shying, made a lunge, and horse, buggy and occupants went over the edge of the embankment, apparently just as the car dashed by.

Appellant pleaded, in addition to the usual defenses, that the horse driven by respondents was, and was known to them to be, "of a shy, skittish, excitable and unruly nature," and that it was inclined, on the smallest pretext, to bolt, plunge and become unmanageable and uncontrollable.

Errors are assigned upon the refusal to grant a motion for nonsuit made at the proper time; the refusal to grant a motion for judgment *non obstante veredicto*, and a motion for a new trial, and upon the giving and refusing of certain instructions.

From the simple statement which has been made, taken, of course, from respondent's testimony, and disregarding for present purposes the evidence of the defense, it is apparent that there was evidence to go to the jury upon the question of whether or not ap-

pellant was complying with the statute, § 27, ch. 142, Laws of 1915, p. 395 (Rem. Code, § 5562-27), which reads as follows:

"Every person driving or operating a motor vehicle on approaching any vehicle drawn by a horse or horses or any horse upon which any person is riding, shall operate, manage and control such vehicle in such manner as to exercise reasonable precaution to prevent frightening of any such horse or horses and to insure the safety and protection of any person riding or driving the same. If such horse or horses appear frightened, the person in control of said motor vehicle shall reduce the speed thereof, and if requested by the raising of the hand or other signal of the driver of such horse or horses shall bring such motor vehicle to a full stop and shall not proceed further unless such movement be necessary to avoid accident or injury or unless such animal appears to be under the control of its rider or driver."

Was the evidence as to the conduct of respondent of such a nature as would have justified the court in granting one or more of the motions referred to? Respondent Ross testified that he had driven the same horse for four or five years, single and double, going to town frequently and driving where automobile traffic was frequent; that he considered her reasonably safe, though he admitted that this same animal had turned around with him on that same bridge six or eight months before. Mrs. Ross testified that her husband had driven the horse singly on many occasions; that she frequently accompanied her husband when he was so driving; that they had passed automobiles safely on the bridge in question, and that she had never seen her husband have any trouble with the horse when driven singly or otherwise. There might have been some statements of these same witnesses less strong in their own behalf, but that would not justify the court in taking from the jury the question of whether

the horse was known to be unsafe, nor can we say that the minds of reasonable men might not differ as to whether respondent Ross, in view of his knowledge of the horse, did or did not act as a reasonably careful and prudent person would under the circumstances shown.

The errors assigned upon the instructions given and refused relate principally to one question. The court instructed the jury as follows:

"You are instructed that one who goes upon a highway, knowing that the animal he is driving is easily scared or frightened by automobiles, and when so is dangerous and uncontrollable, must exercise such care and caution as persons of ordinary prudence, skill and foresight, would use under the same or similar circumstances to avoid accidents and injuries to himself. And in this case if you find from the evidence that the horse which the plaintiffs were driving was known by them to be likely to become scared or frightened at automobiles, and when so was liable to become dangerous and unsafe, then it was their duty, when they observed or should have observed the approach of defendant's automobile, to exercise such care and caution, as persons of ordinary prudence and foresight would have used under the same or similar circumstances, to avoid injury to themselves, and if you find from the evidence that the plaintiffs did not use such ordinary care, and by reason of their failure to do so, the plaintiff J. R. Ross was injured, then in such case, if you so find, the plaintiffs would be guilty of negligence and cannot recover in this action."

It is conceded that the first part of this instruction is proper, but appellant contends that the latter part should have been made to read substantially as follows:

"Now if you find that the horse of plaintiffs was of such a nature and disposition, and that the plaintiffs knew this, or should have known it, and had good reason to know and believe that their horse would

become frightened upon the approach of defendant's automobile, and they did not, by the raising of the hand or other signal, warn the defendant to slow down or bring her car to a full stop, you are instructed that the plaintiffs are guilty of negligence, and your verdict shall be for the defendant."

To have given the instruction in the form requested would have been to lose sight of the fact that there was evidence offered from which the jury might find that the driver of the automobile saw, or in the exercise of reasonable caution should have seen, that respondent's horse was frightened, and if the jury should so find, then, under the statute hereinbefore quoted, there was a positive duty upon the part of the driver to reduce his speed in order to avoid an accident, in addition to the positive duty of such driver to use reasonable precaution to prevent the frightening of the horse. The instruction requested also loses sight of the fact that the signal from the driver of the horse, as required by the language of the statute, is for the purpose of requiring a full stop of the automobile only; and lacking the signal entirely, or, if the signal were not given as soon as it might have been, still the duty devolved upon the driver of the automobile to exercise precaution to prevent the frightening of the horse, and to reduce his speed, or take other precautions to prevent an accident when he saw, or should have seen, that the horse was becoming frightened.

We are convinced that there was no error in the instructing of the jury. The fact that the trial court may have considered the award inadequate is not a reason for granting a new trial to the defendant, and there being evidence to sustain the verdict, as we have already seen, the judgment appealed from must be affirmed.

HOLCOMB, C. J., BRIDGES, MOUNT, and FULLERTON, JJ., concur.

[No. 15567. Department One. January 3, 1920.]

AMERICAN IRON & WIRE WORKS, *Respondent*, v. CASPER FISCHER and FISCHER AUTO BED & CAMP COMPANY, *Appellants*.[1]

SALES (6)—PARTIES LIABLE—EVIDENCE—SUFFICIENCY. In an action on a contract for the manufacture of steel beds, assumed by a corporation organized by a person who ordered and paid for the first lot of beds, the company and not the individual is liable, where the orders were entered against the company and checks in partial payment were received from the company, with whom all the business was transacted.

SALES (143)—DAMAGES (113)—PROSPECTIVE PROFITS—EVIDENCE—SUFFICIENCY. The prospective profits in a contract for the manufacture of steel beds for defendant are not proven with reasonable certainty where plaintiff, after testifying that he would have made a profit of about one dollar a bed, admitted on cross-examination that he had stated that he would not make any profit on the first order, but expected to make thirty to thirty-five cents a bed on future business, and the testimony was indefinite as to the number actually manufactured.

APPEAL (487)—DECISION—MATTERS DETERMINED WITH REMAND. Where the verdict was for the exact amount claimed on several causes of action, it is severable, and the supreme court on appeal can sustain the proof as to one cause of action and deduct the amount for a cause improperly submitted, and render judgment without ordering a new trial.

APPEAL (423)—HARMLESS ERROR—BURDEN TO SHOW PREJUDICE. Misconduct of a party is not ground for reversal, where the trial court found that no prejudice resulted, and there is nothing in the record to show the contrary.

Appeal from a judgment of the superior court for King county, Hall, J., entered July 2, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed as to appellant Fischer; modified as to appellant company.

Ryan & Desmond, for appellants.

Myers & Johnstone, for respondent.

[1]Reported in 186 Pac. 877.

MACKINTOSH, J.—The respondent's complaint alleges for a first cause of action that it and the appellant Fischer, about March 18, 1918, made a verbal contract, the respondent agreeing to manufacture steel automobile beds for Fischer, to be delivered as ordered, and that Fischer made orders as follows: March 18, 1918, 500 beds at $3.10 each; May 9, 1918, 1,000 beds at $4.15 each; and May 22, 1918, 4,000 beds at $4.15 for smaller beds and $5.15 for the larger beds; that the appellant company was organized May 27, 1918, and shortly after its incorporation assumed the contract and agreed to comply with its terms; that, between March 18, 1918, and October 30, 1918, the respondent, pursuant to the agreement, delivered to the appellants 2,081 beds at $8,900.83; also, that, on May 22, 1918, at the time of receiving the order for 4,000 beds, the respondent, at the request of the appellant Fischer, ordered and purchased steel for the appellants, a portion of which steel was consumed in the manufacture of the beds, and that the reasonable value of the steel was $4,363.84, which the respondent paid and advanced for the appellants. The complaint states that the sum of $5,001.30 has been paid on account of the automobile beds and $1,775 on account of the steel, and there remains a balance due the respondent, on account of the beds and steel, of $6,488.37.

The respondent's second cause of action alleges that, after the completion of the 2,081 beds, the appellants repudiated the contract and refused to accept any more beds, which resulted in the loss to the respondent of profits in the sum of $1 per bed on 3,419 beds, and asks, in the second cause of action, for judgment for that amount.

The appellant Fischer, by answer, generally denies the material allegations of the complaint and affirmatively pleads that, relying upon the respondent's repre-

sentations that it had the necessary plant and equipment to manufacture the beds in a satisfactory manner, he placed an order with the respondent for 501 beds, and that, on May 9, he and certain associates incorporated the appellant company, and that from the day of its incorporation all business relating to the manufacture of the beds was between the corporation and the respondent, and that he, personally, had no further business relations with the respondent, except as an officer of the corporation, and that all sums which he personally owed to respondent had been fully paid. The company's answer admits that, upon its incorporation, it assumed and agreed to comply with all contracts theretofore entered into between the respondent and appellant Fischer, but denies that Fischer had, prior to the incorporation, ordered any beds in excess of 501, and denies that respondent manufactured and delivered 2,081 beds, or any number in excess of 1,229, and denies that the value of the beds was in excess of $5,657.48.

As a first affirmative defense, the corporation alleges that, in May, 1918, respondent falsely represented that there was a great shortage of steel necessary for the construction of the beds and that it would be necessary that steel be purchased and stored for future use, and represented that, not having sufficient funds to make the purchase of the steel, it requested the appellant company to advance the necessary money, it being agreed that the money advanced for the purchase of such steel as was necessary to be used in the beds would be credited to the appellant company's account upon beds as they might thereafter be ordered, and that, in pursuance of that agreement, the appellant company advanced to the respondent the sum of $1,500. It further alleges that the respondent purchased steel at more than the market price, and that the appellant

company notified the respondent that, on account of defective workmanship, it would not place any further orders for beds or accept any more of them. As a second affirmative defense, the company alleges that all of the beds manufactured and delivered by the respondent have been more than paid for and that there is a balance due appellant company of $1,138.82. As a third affirmative defense, the company alleges that the beds delivered were so improperly constructed that it was necessary to refinish and rebuild the same, at the cost of $1,608.93. As a fourth affirmative defense, the company alleges that it has expended $8,401.60 in advertising, which has been rendered valueless by the fact that the beds furnished by respondent were defective and inferior in construction and therefore unsalable, and that orders placed with the company for beds have been cancelled, and agents have refused to perform their contracts of sale. This affirmative defense was abandoned by the company on the trial. The respondent generally denies all the affirmative matter in the answers of the appellants. Upon the trial, the jury returned a verdict for $9,907.37, the full amount prayed for by the respondent, against both appellants, from which both appeal.

Four of the grounds upon which reversal is sought which we will consider here are, (1) that appellant Fischer's motion for nonsuit should have been granted; (2) that the issue in regard to the purchase of steel should have been withdrawn from the jury; (3) that the verdict is excessive, in that there was no proof of damages under the respondent's second cause of action; and (4) misconduct of respondent entitling appellants to a new trial.

I. The 501 beds, which it is admitted by appellants were ordered by Fischer individually, have been fully

paid for, and if the orders placed on May 9 and 22 are ones for which the appellant company is alone responsible, no judgment can be entered against Fischer in this case. The record shows that, on April 19, 1918, the articles of incorporation of the appellant company were executed and were filed with the secretary of state on May 9, 1919, and that certificate authorizing the commencement of business was issued on that date. In the time between the execution of the articles and their filing, the corporation had been doing business under its corporate name, for, on April 30, the corporation gave a check to the respondent in the sum of $500, which was signed by the corporate name and bore the name of the corporation conspicuously in two places. On May 1, respondent acknowledged receipt of this check in a letter addressed to the corporation. The shop records of respondent show an order for 501 beds on March 18, 1918, as sold to Fischer individually, and all the records of the respondent thereafter, that is, shop records, ledgers, statements of account and correspondence, in no place refer to Fischer individually, but wherever a name is used, the name of the corporation appears. When the order of May 9 was given, the order was opened in a new shop record, and this new record recites the order as being sold to the corporation. On May 20, the respondent received a check from the corporation for $1,241.30, and on May 21 a check for $1,000. The respondent, on May 21, gave a receipt for the $1,000 payment to the corporation, and the shop records for the last order showed the name of the corporation. All the originals and copies of statements of account rendered by respondent, some twenty-five or thirty, and bearing date from May 17 to September 23, are rendered to the corporation and not to Fischer individually. The respondent's ledger, which contained the only account of the re-

spondent with either of the appellants, is headed in the name of the corporation as successor to Fischer. The account on its face shows that it was originally opened in the name of Fischer, and that the name of the corporation was thereafter inserted above Fischer's name and the charges subsequently made against the corporation. The only testimony in the case that contradicts all these records, made by respondent itself, is the testimony of the respondent's manager that he did not know of the existence of the corporation. This testimony can have no weight, for, though it is an oral statement undisputed, it has to yield to the indisputable physical facts and conditions in the record, which are utterly at variance with it. The record which the manager himself made on receiving checks issued in the name of the corporation and endorsing them for payment, in writing to the corporation acknowledging receipt of the checks and in various other ways, is conclusive, and his bare statement that he had no knowledge of the existence of the corporation is not evidence of that fact. With the record in this condition, there was no liability on the part of Fischer individually which could be submitted to the jury for determination.

The motion for a nonsuit as to Fischer should have been granted.

II. The respondent claims that the steel was purchased through it for the appellants. The appellant company contends that it advanced the money to the respondent to purchase the steel for it to use in the beds. There being this dispute as to the character of the transaction, and evidence having been introduced by either side in support of its position, a question of fact was presented which was properly submissible to a jury, and there was no error in so submitting it. The instruction complained of, in which this issue was sub-

mitted to the jury, contained a proper statement of the law.

III. There was no testimony in this case as to the cost to the respondent of the manufacture of the beds, nor the items which constituted that cost, and the respondent's sole testimony in regard to its profits was contained in the following questions and answers:

"Q. How much profit was the plaintiff able to make on these beds if the order had been completed of those that were not completed. How much of a profit on each bed would you make? A. A dollar a bed. Q. A dollar a bed? A. About a dollar a bed as shown by our cost sheets."

On cross-examination of respondent's manager, occurred the following:

"Q. And didn't you say then in substance, 'Mr. Fischer, I did not expect to make a dollar off this order of beds, but what I do expect is that you are going to sell thousands and thousands of these beds, and I am after your future business, and if I can get your future business, I will make from thirty to thirty-five cents a bed.' A. Yes, I said that."

Upon that testimony the jury returned a verdict for the full amount claimed. The testimony as to the loss of profits was so suppositive and postulatory that in law it could not be the foundation of a verdict. The testimony was indefinite as to the number of beds actually manufactured and delivered, which would leave the number of beds upon which profits were to be figured in the same indefinite condition. Although we are committed to the doctrine that prospective profits are recoverable, they must be proven with reasonable certainty, and the testimony here as to the prospective profits on an indefinite number of beds undelivered was supported by no degree of certainty. *Bromley v. Heffernan Engine Works*, 108 Wash. 31, 182 Pac. 929.

The respondent, having failed in its proof of its

second cause of action, is not entitled to have included in the verdict the amount claimed in that cause of action. The jury having returned a verdict in this case which is severable, by reason of the fact that it was in the exact total of the amounts claimed under both the first and second causes of action, this court can segregate such verdict and subtract from it the amount which is in excess of that which has testimony to support it. In this respect the verdict in this case is not distinguishable from verdicts in those cases where separate causes of action have been pleaded and the verdict has been rendered on each cause of action separately, and does not fall into that class of cases where separate causes of action have been pleaded and the jury having returned a verdict in one amount which is less than the total claimed in the several causes of action, the appellate court is compelled to order a new trial for the reason that it cannot find from the verdict itself how much was included as damages on the cause of action of which there was no proof.

IV. It is claimed that the manager of respondent, during the trial, indulged in such conduct as to prejudice the appellants' case. This is a matter which the trial court was more capable of properly passing on than are we, and he, being familiar with all the actions complained of, has found, by failing to disturb the verdict, that no prejudice was occasioned, and as we cannot say from the record that therein his judgment was incorrect, his action will be final.

The action as to appellant Fischer will be dismissed and a judgment will be entered for the respondent against the appellant company for the sum of $6,488.37, the amount claimed in the first cause of action. The appellants will recover their costs in this court.

HOLCOMB, C. J., PARKER, MAIN, and MITCHELL, JJ., concur.

[No. 15630. *En Banc.* January 5, 1920.]

THE STATE OF WASHINGTON, *on the Relation of Fred C. Brown, Prosecuting Attorney for King County, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *A. W. Frater, Judge, Respondent.*[1]

PROHIBITION (38)—APPLICATION—EVIDENCE AND PRESUMPTIONS—BURDEN OF PROOF. On prohibition to restrain a judge from admitting to bail persons charged with murder in the first degree, the presumption is in favor of a return alleging a proper exercise of his discretion, although it does not negative in terms the exception in Const., art. 1, § 20, by reciting that the proof was not evident or the presumption great; the burden being upon the prosecuting attorney seeking the writ to directly aver and prove the contrary.

Application filed in the supreme court November 12, 1919, for a writ of prohibition to prohibit the superior court for King county, Frater, J., from admitting to bail certain defendants charged with the crime of murder in the first degree. Denied.

Chas. Ethelbert Claypool, for plaintiff.

Walter S. Fulton and *Crawford E. White,* for respondent.

FULLERTON, J.—This is an application made originally to this court for a writ of prohibition.

In the first paragraph of his petition for the writ the relator recites that he is the duly elected and qualified prosecuting attorney of the county of King; that, on November 7, 1919, he, as such prosecuting attorney, filed in the superior court of the county named an information duly charging one William Fay Ealy and one Anna Nemitz with the crime of murder in the first degree, in that they did, on a day named, wilfully, un-

[1]Reported in 186 Pac. 891.

lawfully and feloniously effect the death of one Mary Elizabeth Bryan, by choking, strangling and suffocating her. In the second paragraph of the petition it is charged:

"That thereafter, and upon said day, the said defendants, by their counsel, in open court demanded that the said superior court, by A. W. Frater, one of the judges thereof, admit said defendants to bail and make its order fixing the amount thereof; that thereupon, and upon said demand being made for admission to bail and for such order as a matter of right, the said superior court, by the said A. W. Frater, as judge thereof, without hearing, and in excess of its jurisdiction, and over the protest of the petitioner and his application that said demand be denied, announced that the said superior court for King county, by the said A. W. Frater, as judge, would, not later than the —— day of November, 1919, admit said defendants to bail and fix the amount thereof, and that said superior court of the state of Washington in and for said King county, by the said judge, will so admit the said defendants to bail, notwithstanding the charge against them, as heretofore set out, and contrary to petitioner's demand that said court desist from said action, unless restrained by this Honorable Court; and that he makes this petition for the purpose of procuring a writ of prohibition to be issued out of this court to the said superior court of the state of Washington in and for the county of King, and A. W. Frater, as one of the judges thereof, to prohibit and restrain them, and each of them, from admitting the said William Fay Ealy and Anna Nemitz to bail and fixing the amount thereof, without any hearing, and in excess of the jurisdiction of said court; and that plaintiff and petitioner has no other plain, speedy or adequate remedy either at law or in equity."

On filing the petition in this court, an alternative writ of prohibition was issued, to which the trial judge named made return. In the return he admitted the allegation of the first paragraph of the petition, and to the second allegation answered as follows:

"Answering paragraph two thereof, respondents admit that counsel for the defendants in said criminal case asked that the court fix the bail of the defendants and admit the defendants and each of them to bail and that it make its order to this end, and respondents admit that respondent A. W. Frater, as judge, announced that the application for bail would be granted, and respondents deny each and every other allegation in said paragraph contained, save and except that the respondents admit that an order will be made by the superior court of the state of Washington for King county, fixing the bail of the defendants and admitting said defendants to bail upon bonds being given by them conditioned as required by law and approved by the court, and admit that against said proposed action on the part of the court the plaintiff, through the relator, protested."

As a separate return, he further answered:

"That the case against said defendants is entirely based upon circumstantial evidence, as respondent A. W. Frater, as one of the judges of said court, is informed and believes the fact to be, and said respondent, in announcing that an order would be made fixing the bail of said defendants and admitting said defendants to bail, made said announcement and ruling in the exercise of what the court believed to be a reasonable and proper discretion, and said ruling was not made on the theory that the said defendants were entitled to bail as a matter of right, but in the belief entertained by the respondent judge that the facts and circumstances resulting in the arrest of the defendants and the filing against them of an information charging them with murder in the first degree made a proper case for the admission of the defendants to bail, and in announcing the court's intention of making an order fixing the defendants' bail, it was stated by the respondent judge in open court that in so ruling the court was in the exercise of what the court considered to be a discretionary right, and that, in order to permit the correctness of the court's proposed action to be

reviewed, the court would delay the entry of its order for such reasonable time as would enable the prosecuting attorney to apply for and obtain an order from this court restraining the intended action of respondents, if the same were unauthorized."

The return was not controverted by a reply or by a pleading in any form.

At the hearing, the relator, in presenting the merits of the application, proceeded on the assumption that the trial judge had taken the view that bail in capital cases, under section 20, art. I, of the constitution, was a matter of right; and that he had, without a hearing as to the nature of the proofs or the nature of the presumption against the accused, declared his intention to grant them bail. We cannot, however, think this a just view of the judge's return. True, it is alleged in the petition for the writ that bail was demanded as matter of right and that the judge, without hearing, announced his intention of granting bail, but the return denies these allegations and alleges affirmatively facts which can lead to no other legal conclusion than that a hearing was had; he recites that the case against the accused is entirely based upon circumstantial evidence, as he is informed and believes, and that the facts and circumstances resulting in the arrest of the accused and the filing against them of an information for murder in the first degree made a proper case for their admission to bail. We are aware that it is asserted that the trial judge reached these conclusions from public rumor and current report, and not from evidence developed at a hearing. But it is not so alleged in the respondent's petition nor so stated in the return, and we cannot so presume. The presumption is in favor of the regularity of the proceedings; it is presumed that the judge proceeded in accordance with the settled rules of law and practice. Since to find

facts from the considerations mentioned is not in accord with settled rules of law and practice, the party asserting it must directly aver it, and, if it is denied, must prove it, before a court whose function is to review for error can determine that error in this respect has been committed or the rights of the party violated.

We are aware, also, that the trial judge does not in his return negative in terms the exception contained in the constitutional provision cited; that is to say, he does not recite that he found that the proof against the accused was not evident or the presumption against them not great, but his return, when aided by the presumptions that trend in its favor, has that effect. The very fact that he determined to grant bail presupposes that he concluded that the proof was not evident and the presumption not great, and this court must assume that he rightfully so found, in the absence of evidence or other matter in the record affirmatively showing the contrary.

The parties have also discussed the question upon whom the burden rested to show the constitutional exception, but we cannot think this is a question presented by the record. Moreover, it is one upon which we find a difference of opinion among ourselves, and we prefer to pass it until it necessarily arises.

The alternative writ is quashed and the application for a peremptory writ denied.

ALL CONCUR.

[No. 15379. Department Two. January 7, 1920.]

F. L. STEWART, *Appellant*, v. PACIFIC CADEAU *et al.*, *Respondents.*[1]

FRAUDS, STATUTE OF (9)—REAL ESTATE—CREATION OF ESTATE—ORAL OPTIONS. Where the time for exercising a written option to purchase land had expired and the vendors, after several extensions, refused to further extend the time, any oral option or offer to sell would be void under the statute of frauds; and furthermore was not accepted in a reasonable time, where the parties had by the writing limited the time to five months, and nine months additional expired after refusal to grant the written extension.

Appeal from a judgment of the superior court for Wahkiakum county, Hewen, J., entered January 15, 1919, upon granting a nonsuit, dismissing an action for specific performance. Affirmed.

W. F. Magill and *Wm. Stuart*, for appellant.

Malarkey, Seabrook & Dibble and *J. C. McFadden*, for respondents.

TOLMAN, J. — This is an action to enforce specific performance of an alleged contract for the sale of real estate. From a judgment of dismissal, appellant brings the cause here for review on appeal.

It appears that, on November 29, 1916, the respondents executed a written option to purchase to one George F. Hanigan, which described the land, named the purchase price, and provided for the payment thereof within sixty days, and, if not so paid, the earnest money should be forfeited to the vendors and all rights thereunder should cease. Hanigan assigned the option to appellant, and pursuant thereto respondents, who were the owners of undivided interests in the land, executed deeds and deposited them in escrow

[1]Reported in 186 Pac. 894.

with a bank in Portland, Oregon, with instructions to deliver them if the terms of the option were complied with, and if not complied with within the time specified, to return the deeds to the makers. Various written extensions of the option were made, the last of which, by its terms, expired on May 10, 1917. Thereafter Girard and Delude withdrew their deeds from the bank, and Hanigan undertook negotiations with the respondents to secure a further extension of the option. The result of these negotiations is best shown by a letter written by Hanigan to appellant, dated May 25, 1917, in which he says:

"I have had two different conversations with Mr. Girard, endeavoring to induce him to return his deed to the Lumbermens Bank, but he takes the position that he will not, even for an additional $25 for 30 days. However, he pledges himself to immediately forward the same to the bank upon receipt of telegram to me advising me that the deal is ready to be concluded. I tried to impress upon him how unsatisfactory it was to not have the deed in the bank, but he thinks, or appears to think, that the fact that he can have it there within 24 hours after receipt of notice that the deal is to go through should be sufficient.

"I am not sure if Mr. Delude has returned his deed yet to the bank or not, but I am again writing to him and believe that he will. Mr. Cadeau is contented to leave his deed.

"Will advise you when I again hear from Delude. If Delude forwards deed to bank it will not be so bad, as I am convinced Girard will mail his immediately he thinks that the parties are ready to take up same."

No attempt appears to have been made thereafter to obtain a further written extension of the option, but Delude did return his deed to the bank, where it remained until about February 9, 1918, when it was again and finally withdrawn. On February 11, 1918, appellant deposited the purchase price for the land in

the Portland bank and the respondents were at once notified. The bank did not deliver the Cadeau deed to appellant because, under its instructions, the time limit for the payment and delivery of the deed was May 10, 1917. Girard and Delude, when notified of the payment, refused to return their deeds to the bank for delivery, or to accept the money, and Cadeau refused to authorize the bank to deliver his deed, which had remained in its hands. After withdrawing his deed from the bank on February 9, 1918, Delude sent a deed executed by himself and wife, with the grantee blank, to Girard, and in response to a letter from Hanigan, wrote the latter on February 13, 1918, saying: "I sent the deed to Joe Girard so you can make arrangements with him," and advising that he wanted $1,333 for his interest in the land to be sent to a bank in Astoria, Oregon.

The trial court found, on what appears to be the weight of the evidence, that, though Hanigan might have been the agent of respondents in the first instance to find a purchaser, he was acting for appellant in attempting to obtain an extension of the option, and since there is no serious claim that he had any authority to enter into a binding contract of sale, the letter written by him not only was not a contract in writing, but it was no evidence of an oral contract entered into by the respondents. *Hardinger v. Columbia,* 50 Wash. 405, 97 Pac. 445; *Lawson v. King,* 56 Wash. 15, 104 Pac. 1118; *Arbogast v. Johnson,* 80 Wash. 537, 141 Pac. 1140. Had there been an oral contract made after the expiration of the option, there was no part performance pleaded or shown which would take it out of the statute of frauds.

We see nothing in the conduct of the parties which would constitute a waiver of the strict performance of the terms of a written option. Indeed, there is no

claim that there was anything done before the expiration of the written option which would or could constitute such a waiver. What was done afterwards, as shown by the record, at the very most which can be claimed for it, was no more than an oral option or offer to sell, and as such, there being no part performance, was void under the statute of frauds; and, moreover, if there was any such oral option or offer, it was not accepted within a reasonable time, because here the parties, by a written contract and its extensions, limited the time to a little over five months, and it cannot be successfully contended that an oral offer, following the refusal to further extend the written one, contemplated the giving of nine months' additional time. What we have said applies to each of the respondents, for we cannot see that the failure of Cadeau to withdraw his deed from the bank, or the sending by Delude of his deed to Girard, with authority to make arrangements, which were never made, in any way alters the situation as to either.

Judgment affirmed.

HOLCOMB, C. J., BRIDGES, MOUNT, and FULLERTON, JJ., concur.

[No. 15396. Department One. January 7, 1920.]

MARDEN, ORTH & HASTINGS CORPORATION, *Respondent*, v. TRANS-PACIFIC CORPORATION, *Appellant*.[1]

SALES (153)—BREACH OF CONTRACT—EVIDENCE—SUFFICIENCY. A contract made in November for the sale of soya bean oil for immediate shipment from the Orient was finally breached February 19th following, where upon offer and negotiations for extending the time for delivery, the buyer fixed that time as the limit within which time for delivery could be arranged; failure to reply thereto constituting refusal to deliver as of that date.

SALES (155)—REMEDIES OF BUYER—DAMAGES—PURCHASE OF GOODS ELSEWHERE. Upon refusal of the vendor to deliver soya bean oil "c. i. f. Seattle," the buyer is entitled to recover the difference between the contract price and the market price at Seattle at the time of the breach.

SALES (152)—REMEDIES OF BUYER—ACTION FOR BREACH—EVIDENCE—ADMISSIBILITY. In a buyer's action for damages for failure to deliver soya bean oil to be shipped from the Orient, the market value on the day of the breach may be shown by a trade journal of repute and general circulation throughout the United States, generally relied upon by the trade everywhere, in which quotations were given and sales reported at the place of delivery, which was the principal Pacific Coast point for the importation and distribution of soya bean oil.

COSTS (62)—ON APPEAL—MORE FAVORABLE JUDGMENT. Appellant, obtaining a substantial reduction in the judgment, is entitled to costs on appeal.

Appeal from a judgment of the superior court for King county, Allen, J., entered March 15, 1919, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Modified.

Trefethen & Findley, for appellant.

Donworth, Todd & Higgins, for respondent.

PARKER, J.—The plaintiff, Marden, Orth & Hastings Corporation, commenced this action in the superior

[1]Reported in 186 Pac. 884.

court for King county, seeking recovery of damages which it claims to have suffered from the failure of the defendant, Trans-Pacific Corporation, to deliver four hundred tons of Manchurian pressed soya bean oil, in accordance with a contract for the sale thereof entered into between them. Trial in the superior court for King county, sitting without a jury, resulted in findings and judgment in favor of the plaintiff, awarding it recovery in the sum of $15,680, from which the defendant has appealed to this court.

The trial court found that the contract was breached on April 11, 1918, upon the theory that the time for delivery thereof had been extended by mutual consent until that time, and its delivery then finally refused by appellant, and that, at that time, soya bean oil was worth in the market one and three-fourths cents per pound more than the contract price, and measured respondent's recovery accordingly.

In view of the contentions here made, it becomes first necessary to determine whether or not the trial court was correct in concluding that the breach of the contract occurred on April 11, 1918, or prior to that time, when the difference between the market price and the contract price was less. On November 13, 1917, a written contract was entered into between the parties by the terms of which appellant sold and agreed to deliver to respondent four hundred long tons, 2,240 pounds each, of Manchurian pressed soya bean oil at $14.25 per hundred pounds, to be shipped immediately from the Orient and delivered "c. i. f." (cost, insurance and freight paid) at Seattle. This contract purchase price, it will be noticed, was fourteen and one-fourth cents per pound. Had the oil been shipped from the Orient as originally agreed, it would have, in due course, arrived in Seattle in about four weeks. The contract was made through Horace J.

Holley & Co., brokers. The oil was to be paid for upon its arrival in Seattle.

There is nothing in the written contract indicating that respondent was to furnish appellant any letter of credit to aid appellant in procuring the oil in the Orient, but shortly after the making of the contract, probably within two or three days, at the request of appellant, respondent did procure for appellant a letter of credit in the sum of $130,000, issued by the Equitable Trust Company of New York. This, we think the evidence shows, was done merely as a matter of accommodation on the part of respondent to aid appellant in procuring and shipping the oil from the Orient, and to thereby aid it in hastening delivery. When the letter of credit arrived in Seattle, there was a mistake in its reference to the shipment of the oil, referring to the shipment as "f. o. b." Seattle, when it ought to have been "c. i. f." Seattle. This error, however, was caused to be corrected by respondent within two or three days, at the request of appellant, all of which caused some delay in the furnishing of the letter of credit as requested, which, it is claimed by appellant, furnished an excuse for its failure to deliver the oil as contracted for. This, however, we think, will, as we proceed, appear to be of no consequence, in view of the extension of time mutually agreed upon by the parties for the delivery of the oil. On December 14, 1917, respondent, desirous of being advised as to how soon the oil would arrive, wrote appellant as follows:

"Gentlemen: Under date of November 13th, we closed with you contract for four hundred tons pressed soya bean oil, immediate shipment from the Orient, through Horace J. Holley & Company. Please advise us promptly on what steamer this shipment is coming forward."

This letter was replied to by the appellant on the following day, as follows:

"Gentlemen: Your favor of the 14th. Beg to state that at the present time we cannot give you any information as regards soya bean oil. We will advise you as soon as possible."

On December 17th, respondent wrote appellant, as follows:

"Gentlemen: We beg to acknowledge receipt of your letter dated Dec. 15th in regard to our contract with you for four hundred tons of soya bean oil, immediate shipment from the Orient.

"We understand from Horace J. Holley and Company, that there is a possibility of your not being able to deliver the oil on time, and we take this opportunity to say that we will hold you fully responsible for any damages we may sustain through late delivery of this contract.

"In case that you are in a position to tell us how long this shipment will be delayed or just what the situation is regarding this deal, we assure you that we shall only be too glad to help you to extend the time of delivery for a limited period."

On December 18th, appellant wrote respondent, as follows:

"Gentlemen: Replying to your favor of the 17th, beg to state that we are taking this matter of oil up, and hope to be able to deliver promptly. Nevertheless we feel that our obligations were vitiated when your company failed to make prompt delivery of letter of credit, and when they did do so, sent it incorrect. These delays made it almost impossible for us to fix our obligations on the other side in time to hold the oil at quotations made. Therefore, while we do not expect to sidestep any obligations which belong to us, nevertheless, we feel that the delays which your people caused us will relieve us from any absolute obligations in this matter. There should have been no error in the letters of credit as our offer was plainly

stated, and the letter of credit as it now stands is incorrect, through no error of our part. However we shall advise you fully within a few days."

On December 22, respondent wrote appellant, as follows:

"Gentlemen: We still have for reply your letter of December 18th referring to our contract with you for four hundred tons soya bean oil dated November 13th, for immediate shipment from the Orient.

"If you will look over the contract, which you duly signed, you will find that it was closed at that time under the basis of sight draft and nothing whatever was mentioned about a letter of credit. Considerably later you requested us to open up a letter of credit against this shipment, which we did.

"On receipt of the letter of credit it developed that some mistake had been made in New York and we requested our friends by telegram to correct this mistake.

"In your above mentioned letter you say that the error in the letter of credit still stands and we will thank you for giving us full information just what change in the letter of credit you require. You should have attended to this matter before this, as we telegraphed to our friends in New York on date of Nov. 29. After looking up our purchase contract, of which you have a copy, you will find that the matter of a letter of credit for this shipment has no bearing on the deal at all.

"We are awaiting to hear from you during the next week how soon you expect to make delivery of this oil."

On January 15, 1918, appellant's representative, who signed the contract for it, sailed for the Orient on business for the company, and a day or so before sailing had a conversation with respondent's representative in Seattle, from which we think it is plain they arrived at an understanding that the time for the delivery of the oil in Seattle should be further

extended, though no definite time was agreed upon. On January 30, respondent wrote appellant, as follows:

"Gentlemen: We beg to refer you to our purchase from you of 400 tons pressed soya bean oil, November shipment from the Orient.

"We understood from Mr. Barry, who called on us before sailing for the Orient, that this shipment had been delayed on account of failure of your seller to make delivery as contracted for.

"We told Mr. Barry that we should be very glad to assist you in the matter, and extend time of shipment until early February, and are awaiting to hear from him by cable how soon we can expect shipment.

"We are making a reservation however in this if we cannot hold our own buyers off any longer, we shall be obliged to purchase against you in the open market, and hold you fully responsible for any loss we may sustain in connection with this shipment, as per our letter to you of January 7th."

On January 31, appellant wrote respondent, as follows:

"Gentlemen: Your letter of January 30th has been forwarded to Mr. Barry, who is in Yokohama, and we are expecting a cable from him regarding soya bean oil before many days. We hope that you can wait until this cable reaches us."

On Saturday, February 16, respondent wrote appellant, as follows:

"Gentlemen: Unless we have some definite advice from you when shipment of 400 tons soya bean oil, against our contract with you dated November 13th, will be made, by Tuesday next week, we shall buy this quantity against you in the open market and charge you with the difference."

The Tuesday fixed in this letter as the limit of time within which respondent would wait for advice from appellant would be February 19. This was followed

by other letters from respondent to appellant on March 21, April 4, and April 5, demanding delivery of the oil or damage for failure in delivering it. However, appellant did not write respondent again until April 11, when it did so, declining to accede to respondent's demands. These letters were all written at Seattle, where both concerns had places of business. In addition to these letters, some conversation was had from time to time between the representatives of the respective parties. These conversations, however, do not, we think, show any different attitude of each towards the other relative to the delivery of the oil than is found in these quoted letters, and in the conversation had between the representative of respondent and Mr. Barry, as representative of appellant, just before he sailed for the Orient on January 15th. We agree with the trial court in its finding that there had been an extension of time for the delivery of the oil, except as to the period of such extension. It seems to us that respondent's letter of February 16, above quoted, fixing the following Tuesday, February 19, as the limit of time within which further advice would be awaited from appellant, amounted to a final refusal of respondent to extend the time for delivery beyond that date, if appellant should not then be heard from; and that the silence of appellant thereafter upon the questions of a further extension of time of delivery amounted to a refusal to deliver the oil as of February 19. We are therefore of the opinion that the contract was finally breached on February 19, 1918. Our further inquiry then is, what was the market value of the oil in Seattle on that date.

The evidence introduced of the market value of soya bean oil at Seattle consisted almost wholly of market quotations found in a trade periodical known as "Oil, Paint and Drug Reporter," published on Monday of

each week in New York City, and circulated generally throughout the United States. The weekly numbers of this, published on Mondays from January 7, to April 29, 1918, inclusive, are in evidence. This is a well known and reliable trade journal and contains weekly market quotations of oils of all character, including soya bean oil, at both Eastern and Pacific Coast points, the evidence showing beyond dispute that Seattle is the principal Pacific Coast point for the importation and distribution of such oil from the Orient. The evidence also shows, without dispute, that quotations of the market price of this and other oils found in this periodical are generally relied upon by the trade everywhere in the United States. In the issue of February 18, 1918, sale of several car loads of soya bean oil "at 16¼ cents per pound f. o. b. Pacific Coast," are reported. This, the evidence plainly shows, means at Seattle, the principal Pacific Coast point for the importing and distribution of soya bean oil. The evidence also plainly shows that such oil c. i. f. is one-half cent a pound less than f. o. b. at Seattle, so the conclusion seems to follow that the market value of the oil c. i. f. at Seattle on February 18 was fifteen and three-fourths cents per pound. This may have been the market a day or two before February 18, the date of the issuance of the number, but it is the nearest in point of time to February 19 of any market quotation we have in the evidence, and we have no other evidence before us of the market value of soya bean oil. We note that, in the issue of February 25, the quoted market price remained unchanged at Seattle. We are led to the conclusion that the trial court fell into error in measuring respondent's damage by computing the same upon the basis of one and three-fourths cents per pound, the difference between the contract price of fourteen and one-fourth cents per pound and the mar-

ket price of sixteen cents per pound on April 11, 1918, and that respondent should be awarded recovery upon the basis of one and one-half cents per pound, the difference between the contract price of fourteen and one-fourth cents per pound and the market price of fifteen and three-fourths cents per pound on February 19, 1918; that is, respondent is entitled to recover $13,440 instead of $15,680.

Contention is made in appellant's behalf that the several issues of the Oil, Paint & Drug Reporter were not admissible in evidence. We think this contention is untenable in view of the fact that it is, as the evidence plainly shows, a trade journal of repute, and its quotations of market prices of oils, including soya bean oil, are accepted by the trade generally throughout the United States as reliable and trustworthy. The general rule as to the admissibility of such evidence to show market value of a standard commodity of merchandise is well stated in 10 R. C. L. 1167, as follows:

"It is a rule recognized generally that market reports or quotations as contained in newspapers, trade journals, trade circulars, price lists, etc., are competent evidence of the state of the market. Indeed, such reports, based as they are upon a general survey of the whole market, and constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries or individual sales or inquiries; and courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character. Such evidence is within an exception to the general rule barring the admission of hearsay evidence inasmuch as it comes from a public authentic source which is deemed to give it reliability."

This court recognizes this to be the law in *Peters v. McPhadden*, 75 Wash. 525, 135 Pac. 26, Ann. Cas. 1915C

63, though the question there presented was not this exact question. See note in 16 L. R. A. (N. S.) 758.

We conclude that the judgment must be modified in conformity with the views herein expressed. The cause is remanded to the superior court with directions to correct its judgment so as to award respondent recovery in the sum of $13,440 only, instead of $15,680.

Appellant will recover its costs incurred upon this appeal, in view of the fact that it is here obtaining a substantial reduction in the judgment rendered against it in the superior court.

HOLCOMB, C. J., MACKINTOSH, MITCHELL, and MAIN, JJ., concur.

[No. 15413. Department One. January 7, 1920.]

NELLIE PRIDMORE, *Respondent*, v. NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*, PIERCE COUNTY, *Defendant*.[1]

RAILROADS (34)—LIABILITY—MAINTENANCE OF OVERHEAD CROSSINGS—STATUTES. Under Rem. Code, § 8733-5, providing that the framework and abutments of an overhead highway and railway crossing shall be maintained by the railway company, and the roadway thereover and the approaches by the county or municipality, everything above the framework and abutments would be part of the roadway, and the railway company would not be responsible for a defective bulkhead or railing above the planking of the roadway.

SAME. In such a case, if the curve was dangerous, there could be no recovery against the railway company, since the danger would depend upon protection by a barrier or guard-rail.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered February 11, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Reversed.

[1]Reported in 186 Pac. 862.

Geo. T. Reid, J. W. Quick, and *L. B. da Ponte,* for appellant.

Bates & Peterson and *Sullivan & Christian,* for respondent.

MAIN, J.—This action was brought by the plaintiff against the Northern Pacific Railway Company and Pierce county to recover damages for the death of her husband on April 1, 1917, by reason of an automobile in which they were riding going off the Olympia end of the overhead structure crossing the tracks of the railway company near Nisqually station. The cause was tried to the court and a jury, and resulted in a verdict against the railway company and in favor of the county. Motions for judgment notwithstanding the verdict and, in the alternative, for a new trial being seasonably made and overruled, the railroad company appeals.

The facts necessary to present the controlling question in the case may be summarized as follows: In the spring of the year 1913, the appellant constructed, near Nisqually station, an overhead crossing over its tracks. This crossing was on the principal highway between the city of Tacoma and Olympia and Portland. The crossing was approached from the Olympia end first, on a grade of about nine per cent, which was reduced to about four or five per cent where the turn was made onto the crossing. The roadway of the crossing was about twenty-five feet above the tracks. At the edge of the roadway, on the outside of the curve, was a guard rail, four by six, placed upon two-inch blocks, and a railing three or four feet high placed upon posts. The plans by which the crossing was constructed, prepared by the engineer of the appellant, did not provide for a super elevation on the outside of the curve. An engineer called by the respondent testified that there

was "no super elevation shown on the diagram of the bents, which would indicate that it was level on the curve, if it was not for the fact that the caps are placed in a skewed position instead of being on the radical line, which would account for a slope toward the outside of the curve." The evidence shows that the outside of the curve was not to exceed two or three inches lower than the inside, and could not be detected by observation, but was indicated by the fact that the water would flow in that direction. The curve was described as a sharp one which went through an angle of ninety degrees in a distance of about sixty feet. The roadway on the crossing and curve was twenty-four feet wide.

On the afternoon of April 1, 1917, the respondent, with her husband and two other persons, approached the crossing from the Olympia end in an automobile which was driven by the respondent's husband. The car, as they approached, did not successfully make the turn, but struck the barrier on the outside of the curve, passed over the guard-rail, broke the railing and fell to the railroad tracks below. The respondent's husband was killed, and it is for his death that this action is sought to be maintained.

The respondent described the manner of the happening of the accident as follows:

"Well, it seems just as we made the curve we were headed in the right course, but the machine skidded, as I can judge, the back wheels must have skidded, and there seemed to be a slight hesitation. Whether they caught on the stringer of the bridge or what, but something seemed to catch them; it was so slight we just simply dropped over so easily, scarcely made any noise."

There was other testimony supporting this view, and there was also testimony which indicated that the car, instead of making the turn as it came upon the curve,

went straight ahead over the guard-rail and through the railing.

A number of questions are discussed in the briefs, but the one question which is decisive is whether, under the statute of this state which prescribes respectively the duty of a railroad company and a county or municipality relative to the maintenance of overhead crossings, there can be any recovery. In 1913, the legislature passed an act relating to such crossings (Laws of 1913, ch. 30, p. 74; Rem. Code, § 8733-1 *et seq.*). Section 5 of this act, so far as material to the present controversy, provides:

"When a highway crosses a railroad by an over-crossing or under-crossing, the framework and abutments of the over-crossing or under-crossing, as the case may be, shall be maintained and kept in repair by the railroad company, and the roadway thereover or thereunder and approaches thereto shall be maintained and kept in repair by the county or municipality in which the same are situated, . . ." Rem. Code, § 8733-5.

There is a further provision relative to state roads, and also a proviso, neither of which are here material. It will be noticed that, in the quoted portion of the statute, the framework and abutments of an overhead crossing are to be maintained by the railway company, and the roadway thereover and the approaches by the county or municipality. The use of the word "thereover" would indicate that everything above the framework and the abutments was to be considered as a part of the roadway. Framework, as applied to things built or constructed, means that which furnishes form or strength, or both. In the statute it is used in contradistinction to the roadway which is to be placed upon the framework and the abutments. If this view is correct, everything above the framework and abutments would be a part of the roadway, which would

include the flooring and everything above that. This would make the bulkhead and railing, being above the planking of the roadway, a part of such roadway. Under the statute, the overhead crossing is divided into two parts, one the framework and abutments, which has a tendency to point out that which constitutes the carrying strength of the crossing; and the other part, the roadway, would seem to relate to that which, within the limits of the carrying strength of the framework and abutments, supports the burden of travel.

This case is closely analogous to the case of the *Selectmen of Natick v. Boston & A. R. Co.*, 210 Mass. 229, 96 N. E. 347. In that case the material words of the statute were:

"The expense of maintenance and repair shall be paid as follows: . . . The framework of the bridge and its abutments shall be maintained and kept in repair by the railroad corporation, and the surface of the bridge and its approaches shall be maintained and kept in repair by the city or town."

Construing this statute, it was there said:

" 'Surface' is used in contradistinction to 'framework' and is tantamount to flooring when one considers a bridge as a whole, to be kept in repair in part by a railroad and in part by a town. The railroad furnishes the support or 'framework' for the road or 'surface' which the town is to maintain. If the report of the commissioners had required but one layer of planks five inches in thickness, that plainly would have been all 'surface.' The fact that two layers, each of thinner planks, were ordered does not affect the substance of the matter, which was in fact the surface of the street as distinguished from the supporting framework.

"In the division of the whole structure of a bridge into these two parts, the word 'framework' has some tendency to point out that which constitutes the carrying strength of the bridge, while 'surface' seems more nearly to relate to that which within the limits of the

carrying strength supports the immediate burden of travel. Both layers of planks are needed for this latter purpose."

While the Massachusetts statute uses the word "surface" in the same connection that our statute uses the word "roadway," it is clear that the word "roadway" is at least as comprehensive as the word "surface," and probably more so. The holding in that case supports the interpretation given to the statute here involved, as above indicated. This interpretation is simple, direct and natural, and avoids troublesome questions of liability which might arise if the difference between framework and abutments, on the one hand, and roadway, on the other, is not clearly defined. Under this view, the railroad company would not be liable for failure to maintain any part of the roadway, which would include the planking and the barrier. If there was liability on account of a defect in either of these, it would be that of the county, in whose favor the jury returned the verdict, and from the judgment entered thereon no appeal is prosecuted. It is said, however, that the curve was too sharp, but this of itself, if true, would not permit recovery. Whether a particular curve is dangerous would depend upon whether it was sufficiently protected by a barrier or guard-rail. If the curve was on the approach it was a matter which, under the statute, the county or city was required to maintain, and the railroad company would not be liable for what happened on the approach.

In the complaint there were a number of specifications of negligence, but other than that of the barrier, the slope of the curve, and the shortness of the curve, there is no evidence in their support. Under the evidence in this case it is clear that the primary cause of the accident, if it be assumed that there was defective construction, was that of an insufficient barrier or

guard-rail. The respondent testified, as above set out, that the back wheels must have skidded and there seemed a slight hesitation and the car easily dropped over. In determining whether a guard-rail is sufficient, attention must be given to the surrounding circumstances of the particular case.

"Having regard to the character and amount of travel; the nature of the road itself, its width and general construction, the extent of the slope or descent of the bank, the length of the portion claimed to require a railing, whether the danger is concealed or obvious, the character of the place between which and the traveled road it is claimed the barrier should be erected, and the extent of the injury likely to occur if a railing is not maintained. That is to say, the question in each case is whether, under the facts disclosed by the evidence, the county, by not erecting the barrier, failed in its duty to maintain the highway in a reasonably safe condition for ordinary travel." *Culley v. King County,* 101 Wash. 38, 171 Pac. 1034.

The accident in the present case was not due to any defect in the framework or abutments of the crossing. The legislature had the right to determine the respective liabilities of the railroad company and the county or city, and having spoken upon the subject, its will is controlling.

It may be admitted that, under the common law rule, the appellant would be liable. The authorities cited by the respondent on this question state the common law rule, or construe statutes which are substantially a reenactment of the common law. In none of the authorities relied upon as sustaining liability was a statute involved similar to the statute of this state.

The judgment will be reversed, and the cause remanded with direction to the superior court to dismiss the action.

HOLCOMB, C. J., PARKER, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 15461. *En Banc.* January 7, 1920.]

NATIONAL BANK OF COMMERCE OF SEATTLE, *Respondent*, v. SEATTLE NATIONAL BANK, *Appellant*.[1]

BANKS AND BANKING (25)—PAYMENT OF FORGED CHECKS—RIGHTS AS BETWEEN BANKS—ACCEPTANCE—EFFECT. Where checks to fictitious payees with forged indorsements passed through the clearing house and were paid by the drawee bank, the payment admits the existence of the payees and their capacity to indorse, under Rem. Code, § 3453, providing that acceptance of a check admits the existence of the drawer and drawee and their capacity to draw and indorse; since payment includes acceptance.

SAME (25). In such case, the drawee bank paying the checks cannot recover the sums from the bank passing them through the clearing house, on the ground of the nonexistence of the payees and negligence in paying forged checks, upon showing that the person depositing and indorsing the checks and forging the names of the payees was acting under an assumed name as a customer of the passing bank, where such party was at all times insolvent and deposited to a checking account in usual course and there was nothing to put the passing bank upon inquiry; since the vice of the transaction rested in the fact of the fictitious payees, whose existence, under the statute, was admitted by the drawee when it paid them.

SAME (25). A national depositary bank chargeable with notice of the regulations of the Treasury Department requiring checks of a public disbursing officer to state the object or purpose for which any check was drawn cannot claim negligence on the part of other banks not aware of the regulations in causing a loss by passing checks drawn upon the depositary bank to fictitious payees by a public disbursing officer, where for years such depositary bank cashed and passed a stream of such checks by such officer which contained no notation as to their object or purpose, and gave no caution or notice that they were irregular on their face.

BILLS AND NOTES (90)—PAYMENT OF CHECK—RIGHTS OF PARTIES—"HOLDER." Rem. & Bal. Code, § 3457, of the negotiable instrument law providing that all indorsers warrant to subsequent holders in due course the matters mentioned in the preceding section and engage, in case of dishonor and due notice, to pay the amount thereof to the holder, was not intended to define any obligation or liability to the drawee, who by acceptance, under the terms of Id.,

[1]Reported in 187 Pac. 342.

§ 3453, admits the existence of the payee and his capacity to indorse; since the drawee paying a check is not a "holder" and acceptance and payment strips the instrument of all negotiability.

JUDGMENT (209) — CONCLUSIVENESS—PERSONS CONCLUDED—NOTICE TO DEFEND—NONLIABLE. Judgment for the United States against a drawee bank for the amount of government funds embezzled by a public disbursing officer, by means of checks to fictitious payees and forged indorsements, wrongfully paid by the bank, does not foreclose the defense of another bank which passed the checks through the clearing house, on their deposit to a checking account, although the defense of the action was tendered to it, where the defense was declined by the passing bank and it was under no legal obligation in the premises to make good the loss of the drawee bank.

Appeal from a judgment of the superior court for King county, Honorable Marion Edwards, Judge *pro tempore,* entered May 3, 1919, upon findings in favor of the plaintiff, in an action to recover money paid on forged checks, tried to the court. Reversed.

Bausman & Oldham and *W. L. Nossaman,* for appellant.

Kerr & McCord and *Stephen V. Carey,* for respondent.

MITCHELL, J.—Both of the parties to this action are national banks engaged in business in the city of Seattle. During the years 1907, 1908 and 1909, one M. P. McCoy was an examiner of surveys and special disbursing agent for the United States Government, acting under the directions of the Interior Department. While McCoy was thus employed, the United States caused to be deposited, from time to time, with the National Bank of Commerce considerable sums of money to his credit, to be used solely for paying expenses he was authorized to incur in his services to the general government as such examiner of surveys and special disbursing agent. The deposits were made with the plaintiff as a government depositary, in ac-

cordance with the laws of Congress and the regulations of the Treasury Department relating to such deposits and the disbursements thereof. From time to time during the years mentioned, McCoy drew fraudulent checks on the depositary bank aggregating an amount largely in excess of those to which this action relates, payable to fictitious payees, forged the indorsements of such payees upon the checks, and procured from various banks for his own use the amounts of such checks, including the sum of $13,509.37 from the defendant. After the issuance of such checks from time to time, they were presented to and paid by the plaintiff without any authority from the United States and charged against the public funds on deposit to the credit of McCoy. The frauds and forgeries being discovered by the United States, suit was brought by it to recover the total amount of such deposits thus paid out by the National Bank of Commerce. That suit was successful. *United States v. National Bank of Commerce,* 205 Fed. 433; and *National Bank of Commerce v. United States,* 224 Fed. 679. The National Bank of Commerce having satisfied that judgment, instituted the present action to recover from the defendant the amount of those fraudulent checks, one hundred and thirty-five in number, that passed through the defendant bank, together with interest. The cause was tried by the court without a jury, and resulted in a judgment in favor of the plaintiff, as demanded in the complaint. Defendant has appealed.

All of the one hundred and thirty-five checks involved were fraudulently drawn on respondent. They passed through appellant's bank from June 30, 1908, to September 4, 1909, a portion every month except October, 1908, and February and March, 1909. Each of the checks was actually signed by M. P. McCoy, as maker, to which signature he attached the description

"Exr. Surveys & S. D. A.," and approximately one-half of them (about evenly distributed through the whole period of time) did not bear any notation of the object or purpose for which they were drawn. Upon forging the payees' names as indorsers, McCoy then indorsed the name "F. M. Clark" and deposited the checks to his credit, as F. M. Clark, with appellant, that knew him by that name only. The checks, as received by appellant, were promptly passed on through the clearing house association and promptly paid by respondent and, as already stated, charged by it against the United States deposit. Respondent claims it knew nothing of the infirmity in the checks until it received notice to that effect from the United States district attorney on March 10, 1910. Nor did appellant have notice thereof until it in turn promptly received from respondent a copy of the notice from the United States district attorney.

By § 185 of the negotiable instruments law (Rem. Code, § 3575), a check is declared to be a bill of exchange drawn on a bank, payable on demand. Section 62 of the same law (Rem. Code, § 3453), provides:

"The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits—

"(1) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and

"(2) The existence of the payee and his then capacity to indorse."

If respondent is allowed to prevail in this action it must do so in spite of the very things the statute says it admits, viz.: (a) The existence of the drawer, the genuineness of his signature [neither in dispute here], and his capacity and authority to draw the instrument, and (b) the existence of the payee and his then ca-

pacity to indorse. Certainly, if such admissions imposed by the statute apply in the case of mere acceptance, necessarily they must apply in the case of honoring by actual payment, inasmuch as payment includes acceptance. *First National Bank v. Bank of Cottage Grove,* 59 Ore. 388, 117 Pac. 293; *National Bank of Rolla v. First Nat. Bank of Salem,* 141 Mo. App. 719, 125 S. W. 513; *Bank of Indian Territory v. First Nat. Bank,* 109 Mo. App. 665, 83 S. W. 537; *Neal v. Coburn,* 92 Me. 139, 42 Atl. 348, 69 Am. St. 495.

On the other hand, it is insisted, notwithstanding the plain provisions of the law, that the case of *Canadian Bank of Commerce v. Bingham,* twice before this court, and reported in 30 Wash. 484, 71 Pac. 43, 60 L. R. A. 955, and 46 Wash. 657, 91 Pac. 185, is authority to the contrary. Consideration is here given to that case only to ascertain if its doctrine is applicable to the present case. That was a case in which seven checks were forged, that is, the name of the drawer was forged to all of them. They were passed through Bingham's private bank on to the drawee and paid by it. Shortly, upon discovery of the forgeries, the drawee bank sued Bingham upon his indorsement. A demurrer was sustained to the complaint, and the ruling reversed in the first report of the case. Afterwards, upon trial, plaintiff prevailed, and on appeal the judgment was affirmed. The complaint alleged innocence and good faith on the part of plaintiff, and further alleged not only general, but specific acts of negligence on the part of Bingham, to the effect that he failed and neglected to have the holder and the person in whose possession the check was at the time of presentation to him for payment properly identified, or identified at all, and that, had he used any care or caution, he would have easily discovered the forgeries.

In discussing the complaint, the court specifically stated that Bingham relied upon the general doctrine that the drawee bank is bound to know the signature of its own depositor and must, at its own risk, detect a forgery before paying the check. It was also stated that the drawee bank conceded the general rule but contended for an exception, sustained by the court in the opinion, viz.:

"That if it appears that the one to whom payment was made was not an innocent sufferer, but was guilty of negligence in not doing something which plain duty demanded, and which, if it had been done, no loss would have been entailed upon anyone, he is not entitled to retain the moneys paid through a mistake on the part of the drawee bank."

The court disposed of the matter just as counsel presented it, upon the faith of the general doctrine without any reference to the statute law. That decision settled the law of the case; it was so stated in the second decision. At the trial of that case it appeared that the checks were forgeries; that, as to one of them, the Bingham bank took it from some one whom none of its officers could recall and cashed it upon its being indorsed in the name of the payee, a person known to none of the officers of the bank, nor to any of the officers of the company whose name had been forged as maker of the check; while, as to the other six checks, they were presented to the Bingham bank by various business men who had taken them in the course of trade. The court found both banks had acted negligently, but gave judgment against Bingham upon his indorsement, upon the theory, it seems, that, in addition to his negligence, it did not appear from the pleadings and evidence in the case that he had suffered any loss by reason of the delay or negligence of the drawee bank.

The present case is different from that case in many material respects. Here M. P. McCoy, who committed all the fraud, has at all such times been, and is, insolvent. Besides, as was said in the case of *United States v. National Bank of Commerce of Seattle*, 205 Fed. 433, referring to these same fraudulent checks of McCoy's:

"The defendant bank, as a national depositary, was chargeable with notice of the limitations of McCoy's authority to check out the public money deposited with it. Section 5153 of the Revised Statutes (U. S. Comp. St. 1901, p. 3465), provides:

" 'All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money . . . under such regulations as may be prescribed by the Secretary.'

"One of the regulations promulgated by the Secretary of the Treasury on April 16, 1903 (Department Circular No. 49, § 6), provides:

"If the object or purpose for which any check of a public disbursing officer is drawn is not stated thereon, as required by departmental regulations, or if any reason exists for suspecting fraud, the office or bank on which such check is drawn will refuse its payment.' "

As already noticed, respondent, wholly neglectful of the law and the regulations of the Treasury Department, permitted a stream of checks, nearly half of which contained no notation as to their object or purpose, to pass through appellant bank for a period of nearly two years, without any caution or suggestion that any of them were not regular on their faces as to the positive requirements of the law and department regulations. Appellant knew nothing about the regulations, nor did it have any information as to the meaning of the designation, "Exr. Surveys and S. D. A.," written under McCoy's signature on the checks. It further appears, during the whole period of the account with appellant, comprising the one hundred and

thirty-five checks, McCoy (who dealt with it in the name of F. M. Clark) never received any cash, but treated it as a checking account in such a way that he always had a substantial balance to his credit, so that, at most any time within the period, if respondent had, within a week or ten days after receiving any such check, called appellant's attention to irregularities on the face of the checks, measured by the treasury department regulations, appellant could have seasonably protected itself against loss, besides being put upon inquiry generally in its dealings with McCoy.

McCoy forged the payees' names in handwritings as varied as the number of such payees, duplicating the handwritings for each name, when used oftener than once, with such cleverness as to escape detection at the hands of the officers of both banks, and then indorsed them as F. M. Clark, in which name he transacted all his business with appellant. It is contended appellant was conclusively at fault for its mistake as to the identity of Clark. The real vice in the checks was the fictitious payees, as to whom, by the terms of the statute, respondent admitted their existence and their capacity to indorse, by its act of accepting and paying the checks. There was nothing suspicious about the way in which appellant became acquainted and transacted business with M. P. McCoy as F. M. Clark. He went to Seattle a stranger in November, 1907. On November 18, he entered the bank to open an account, gave the name of F. M. Clark and signed an identification card as such. At the time, he had a "C. H." certificate for $100 and a check for $500, neither of which is involved in these fraudulent transactions, deposited them with the bank, informing it he did not want the money, but only wanted the paper collected so he could check on it later. The collections were made, and thereafter other deposits were made

by him down to January 18, 1918, the total amounting to $1,932.25, against which he drew checks from November 25, 1907, to February 27, 1908, when the account was closed. The account remained closed until June 30, 1908, when he commenced a new account, involving these one hundred and thirty-five fraudulent checks, in the same name as that by which he was already known to the bank for three months, during which time he did business with it, in a false name, it is true; but that was immaterial. The name he used was sufficient to serve its purpose of identifying the person with whom the appellant was dealing. And it is to be noticed that, when he opened his last account, he desired no cash and always maintained a substantial balance until his final check on September 7, 1909. It presents a different situation from that in the case of *Canadian Bank of Commerce v. Bingham, supra,* where a fraudulent indorser, unknown as to his person and name, demanded and immediately received payment on passing the forged checks, while in the present case, Clark, known to appellant as such by a former course of apparently legitimate dealing, received no payment from appellant except by his checks, drawn days after the several deposits were made and days after the fraudulent checks had passed on to and been accepted and paid by respondent. There is no evidence, nor are we cognizant of any reason, which required appellant, at the time of opening the second account, or at any other time, to conduct an examination to ascertain if Clark was Clark, or if he was McCoy, else be charged with negligence. He customarily appeared in person at the bank in making deposits, and there seems to have been nothing suspicious about his conduct with the bank and its officers.

Counsel for appellant urge upon our consideration the alleged violation of the clearing-house rule requir-

ing "not good" checks to be returned within twenty-four hours, Saturdays excepted. But we do not discuss the rule, because, independent of it, if applicable here, respondent is bound just as much without it, in this case, because it kept the checks without notice of any kind to appellant until long after all the transactions had taken place.

Both banks were members of the Seattle clearing house, the object of which, as respondent states, is to facilitate and effect at one place daily exchanges between the member banks. Reliance is had by respondent upon a portion of article 14 of the articles of the Association of Seattle Clearing House, and a portion of one of its rules. The portion of article 14 relied on relates to all items passing through the clearing house and requires them to have the written or stamped indorsements, in a certain designated form, of the bank passing them, and then specifically provides:

"The bank using such stamp thereby makes itself responsible for all items so stamped by it, the same as if its indorsement had been written thereon."

Likewise, the portion of the rule of the clearing house referred to deals with the use of the stamp upon negotiable paper for clearance by members of the association, states the purpose and effect of the use of the stamp, and says:

"It is the intention of this resolution to give to indorsements by the C. H. stamp the effect of a written indorsement."

That is, it is but the equivalent of the obligation imposed by the statute upon the passing bank. Section 66 of the negotiable instruments law (Rem. Code, § 3457) provides:

"Every indorser who indorses without qualification, warrants to all subsequent holders in due course—

"(1) The matters and things mentioned in subdivisions 1, 2 and 3 of the next preceding section; and

"(2) That the instrument is at the time of his indorsement valid and subsisting.

"And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it."

It is obvious, however, the statute is not intended to define any obligation or liability to the drawee, who, as already noticed, by the terms of § 62 of the negotiable instruments law (Rem. Code, § 3453), upon acceptance, and hence upon payment, admits the capacity and authority of the drawer to draw the instrument and the existence of the payee and his then capacity to indorse. That the rule as to the contract of indorsement, announced in § 66 of the act, does not run in favor of the drawee, but only to some intermediate party, is also established by the unnumbered closing paragraph of the section in enumerating the undertakings or engagements made by the indorser upon which any subsequent indorser may rely when the instrument is presented to the party upon whom it is drawn; and also for the further reason that the statute positively limits its scope "to all subsequent holders in due course." "Holder" refers to one who has taken the instrument as it passes along in the course of negotiation towards the drawee, and not the latter, who, upon the acceptance and payment of the instrument, thereby strips it of all negotiability and reduces it to a mere voucher or proof of payment. This rule is clearly stated in the case of *First National Bank v. Bank of Cottage Grove,* 59 Ore. 388, 117 Pac. 293, as follows:

"When the defendant bank, which was a holder in due course, presented these checks to the plaintiff bank, the drawee, and they were honored, accepted, and paid, the prior indorsers were thereby discharged from further liability. The checks when so paid had run their course; they were no longer checks within the meaning of the negotiable instruments law, but only canceled vouchers; and the plaintiff was not a holder thereof in due course. *St. Louis Bank v. German American Bank* (Mo. App.), 127 S. W. 434; *Riverside Bank v. Shenandoah Bank,* 74 Fed. 276, 20 C. C. A. 181; *Neal v. Coburn,* 92 Me. 139, 42 Atl. 348, 69 Am. St. Rep. 495; *Farmers' & Merchants' Bank v. Rutherford Bank,* 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817."

Nor is respondent's contention tenable that appellant is foreclosed by the judgment of the United States against it. It is true that, when that suit was brought, respondent promptly advised the appellant thereof and tendered the defense to it. The offer was declined. The appellant was under no legal obligation in the premises, and hence in no way estopped or concluded by the judgment in that case.

Reversed, with directions to enter judgment in favor of the appellant.

ALL CONCUR.

[No. 15466. Department One. January 7, 1920.]

O. R. RICHARDSON, *Respondent*, v. GREAT WESTERN MOTORS, INCORPORATED, *Appellant*.[1]

SALES (182)—CONDITIONAL SALES—REMEDIES OF SELLER—RETAKING POSSESSION—IMPAIRMENT OF SECURITY—EVIDENCE—SUFFICIENCY. Before the vendor in a conditional sales contract can take possession of the property under the insecurity clause in the contract, it must show that the vendee had committed or was about to commit some act tending to impair the security, and it is not sufficient to show unpaid storage charges which did not impair the security.

TROVER AND CONVERSION (5)—ACTS CONSTITUTING—RETAKING POSSESSION BY CONDITIONAL SALE VENDOR. The vendor in a conditional sales contract of an automobile wrongfully taking possession of the car, is guilty of a conversion.

SAME (11)—ACTIONS—CONDITION PRECEDENT—DEMAND. Upon the wrongfully taking possession of property, no demand is necessary as a condition precedent to an action for a conversion.

SAME (8)—RIGHT OF ACTION—WAIVER. The fact that a conditional sales vendee of an automobile, that had been wrongfully taken from him by the vendor, requested to be taken to it in order to get his license plates, does not constitute a waiver of his right to claim a conversion.

SAME (31)—DAMAGES FOR CONVERSION—MEASURE OF DAMAGES. The measure of damages for the wrongful conversion by a conditional sales vendor is the value of the property at the time of the conversion, less the balance of the unpaid purchase price, and it would be unnecessary to plead such balance as a counterclaim or set-off.

Appeal from a judgment of the superior court for King county, Frater, J., entered March 24, 1919, upon findings in favor of the plaintiff, in an action for conversion, tried to the court. Modified.

Dan Earle, for appellant.

John F. Dore, for respondent.

[1]Reported in 187 Pac. 333.

MAIN, J.—The purpose of this action was to recover damages for the conversion of an automobile. The cause was tried to the court without a jury, and resulted in findings of fact, conclusions of law and judgment sustaining the right to recover. From this judgment, the defendant appeals.

The facts out of which the litigation arose may be summarized as follows: On April 15, 1918, the appellant sold to the respondent an automobile upon a conditional sales contract. At the time of the sale, a portion of the purchase price was paid in cash and the balance, by the terms of the contract, was to be paid in installments falling due on the 15th day of each succeeding month. The payment which became due on December 15, 1918, was not paid on that date. On January 6, 1919, a representative of appellant called at the bank where the payments were to be made and ascertained that the December payment had not yet been made. Later during this same day the respondent called at the bank and made the payment. On January 7, the day following, the appellant took possession of the car and removed it to its garage. Approximately six weeks prior to this time the respondent had put the car in another garage. The automobile had been used as a jitney or for-hire car; the engine of the car was in a somewhat torn-down condition. Respondent had been working upon it at odd times during the six weeks mentioned. The contract contained a provision for forfeiture in case of default in the payments, and also a clause that the vendor (the appellant) should have a right to take possession of the car if it should "deem itself insecure." The provision with reference to forfeiture for nonpayment will not be further referred to, because, at the time the car was taken by the appellant, there was then no payment in default. The respondent instituted this action

before the 15th day of January, when the next payment became due. The appellant, after the January payment became due and was unpaid, declared a forfeiture of the contract.

The appellant first claims error in the exclusion of evidence. Upon the trial it offered to prove that the owner of the garage in which the car was stored where the repairs were being made by the respondent had complained to the officers or employees of the appellant that the car was in his way, that the storage charges were unpaid, and that he was unwilling that it remain there longer. This offered evidence was objected to by the respondent and excluded by the court. The purpose of offering it was to show that the appellant was justified in taking possession of the car under the insecurity clause in the contract. To justify the appellant in taking possession under this provision it was necessary for it to show that the respondent had committed, or was about to commit, some act which would tend to impair the security. It could not act in a purely arbitrary manner. *Newlean v. Olson,* 22 Neb. 717, 36 N. W. 155, 3 Am. St. 286; *Skookum Lumber Co. v. Sacajawea Lumber & Shingle Co.,* 107 Wash. 356, 181 Pac. 914, 187 Pac. 410.

From the evidence offered and rejected, the appellant would not be reasonably justified in concluding that the respondent had done, or was about to do, some act which would impair the security. In the argument it is claimed that the owner of the garage in which the car was stored was threatening to set the car out in the street if it was not taken away by the appellant. The offers of testimony, however, do not go to this extent. The evidence is only to the effect, as above indicated, that the storage charges were accumulating; that the car was in the way; and that the owner of the garage desired that the appellant take it

away. As to the storage charges, it only need be said that the respondent contends, and the appellant concedes, that such charges were subordinate to the rights of the appellant under the contract. Their accumulation would not impair the security.

The second point is that the appellant's acts did not constitute conversion. The car was taken from the garage in which it was stored and removed to the garage of the appellant, and remained in its torn-down condition. The evidence not being sufficient to entitle the appellant to take possession of the car under the insecurity clause in the contract, its taking was wrongful and in violation of the rights of the respondent. The taking being wrongful and without justification, no demand was necessary as a condition precedent to the right to maintain an action for conversion. There is nothing in the evidence that would justify the conclusion that the respondent had acquiesced in the taking or waived his right to wage an action for conversion without previously having made a demand. It is true that, after the car had been taken by the appellant, he went to its garage and requested an officer or employee to accompany him to the room where the automobile was stored, in order that he might get his license plates. This circumstance, however, would not amount to an acquiescence in the original taking, or a waiver of his right to claim a conversion.

The respondent excepted to the findings and conclusions upon which the judgment was based, and now claims that the damages awarded were not measured by the correct standard. The trial court found that, at the time of the conversion, the automobile was of the value of $700. The evidence shows that there was a balance of the purchase price which had not been paid in the sum of $324. The rule is that, where the conditional vendee sues the conditional vendor for con-

version, "he can recover only the value of the chattel less the unpaid portion of the price." 28 Am. & Eng. Ency. Law (2d ed.), p. 731. Under this rule the respondent was not entitled to recover $700, the value of the car at the time of the conversion, as found by the trial court. He was only entitled to the difference between $700 and $324, which would be $376. The respondent seeks to meet this objection by asserting that the appellant is now claiming an offset or counterclaim without having pleaded the same, but there is no element of counterclaim or offset in the appellant's position. The question on this branch of the case was the amount of damages which the respondent was entitled to recover. The appellant has a right to invoke the rule of law above stated and secure a reduction of the judgment. The cause will be remanded to the superior court with direction to enter a judgment in favor of the respondent in the sum of $376.

Judgment modified.

HOLCOMB, C. J., MACKINTOSH, PARKER, and MITCHELL, JJ., concur.

[No. 15493. Department Two. January 7, 1920.]

GUY C. WILLIAMS, *Respondent*, v. N. SNOW, *Appellant*.[1]

PLEADING (104)—AMENDMENTS TO CONFORM TO PROOF. The complaint in an action in equity for a partnership property may be amended to conform to proof showing plaintiff was entitled to recover for advances and services, where it develops that the partnership had no title to the property and plaintiff's allegations were made in good faith.

APPEAL (119-1)—OBJECTIONS TO PLEADINGS—AMENDMENTS. Error cannot be assigned in allowing a complaint to be amended to conform to proof on the ground of surprise, where the objection was not made below.

Appeal from a judgment of the superior court for Kittitas county, Allen, J., entered December 27, 1918, upon findings in favor of the plaintiff, in an action for equitable relief, tried to the court. Affirmed.

Eugene E. Wager, for appellant.

Kern & Henton, for respondent.

TOLMAN, J.—The complaint in this action, in substance, alleges that the parties hereto had theretofore entered into a copartnership to engage in the sheep business, and after detailing various matters done and to be done thereunder, sets forth that appellant agreed to turn into the partnership a certain band of sheep, consisting of eighteen hundred ewes, which he then claimed to own individually, one-half of the reasonable value thereof to be paid therefor by the respondent out of his one-half of the profits to be realized from the partnership business; that thereafter respondent devoted all of his time to the partnership business and the care of such sheep, and advanced and expended for the use and benefit of the partnership

[1]Reported in 186 Pac. 861.

$1,459. It is further alleged that, in March, 1918, appellant assumed exclusive possession of all the partnership property and affairs, commingled the sheep referred to with sheep belonging to others, and clipped and sold the wool therefrom, appropriating the proceeds to his own use, and refused to account therefor, with intent to deprive respondent of his interest in the partnership. The prayer of the complaint is that the partnership be dissolved, an accounting be had, the partnership property be sold, and after the payment of the partnership debts, the proceeds be divided according to the respective interests of the copartnership, and for general relief. The answer is a general denial. The cause was tried as an equitable one to the court, and after hearing all the evidence, the trial court orally gave his opinion, in which he held that the undertaking was a joint venture or limited partnership; but because the eighteen hundred ewes which appellant had agreed to turn into the partnership did not belong to him, being then and ever since the property of another partnership, composed of appellant and one Smithson, who is not a party here, that the partnership under consideration gained no title to the sheep, and therefore there was no partnership property to be accounted for, sold or divided; that the pleadings would be considered amended to conform to the proof, and because of appellant's misrepresentations as to the ownership of the sheep, upon which respondent relied, respondent would be entitled to recover to the extent of his advances and expenditures in money and services. Findings and judgment followed in favor of the respondent for $1,452 and costs, from which this appeal is prosecuted.

Appellant's main contention here is that the court erred in rendering judgment in effect for damages instead of dismissing the action when it was found that

there was no partnership assets to be divided. While it appears that respondent knew before he brought the action that Smithson claimed some interest in the sheep referred to, yet it is not claimed nor intimated that he acted in bad faith in framing his complaint upon the theory which he did, and there is nothing to warrant us in so finding. Assuming, then, that the theory of the complaint was adopted in good faith, did the court err? We think not. In *Browder v. Phinney*, 30 Wash. 74, 70 Pac. 264, it was held by this court that the superior court is a court of general jurisdiction, with power to hear and determine both legal and equitable issues, and that when the court is advised as to the facts in a case of which it has jurisdiction, it should apply the proper remedy, be it legal or equitable, since a party is not to be turned out of court if entitled to any relief under the pleaded facts. This rule has been followed in many cases, among which are: *Brown v. Baldwin*, 46 Wash. 106, 89 Pac. 483; *Maitland v. Purdy*, 49 Wash. 575, 96 Pac. 154; *Pacific Iron & Steel Works v. Goerig*, 55 Wash. 149, 104 Pac. 151; *Dolan v. Cain*, 59 Wash. 259, 109 Pac. 1009; *Hewett v. Dole*, 69 Wash. 163, 124 Pac. 374; *Coliseum Investment Co. v. King County*, 72 Wash. 687, 131 Pac. 245, and *Salt v. Anderson*, 107 Wash. 149, 180 Pac. 873.

But it is contended that the case was tried upon the theory that whether or not the partnership existed was the paramount if not the sole issue, and had appellant known that the judgment for damages would follow, he could and would have introduced proof disputing or disproving the items which the court allowed, and might, as a matter of right, have demanded a jury trial. The answer is that, when the trial court orally announced his findings, appellant did not call these matters to his attention, nor ask for leave to introduce such further proof, or file his demand for a

jury trial. In the absence of some such action below, this question cannot be raised and reviewed here. *Dolan v. Cain* and *Pacific Iron & Steel Works v. Goerig, supra.*

All other errors assigned relate to the sufficiency of the evidence to support the findings and judgment. We have carefully read the entire record, and we cannot hold that the evidence preponderates against the findings of the trial court in any respect.

Judgment affirmed.

HOLCOMB, C. J., FULLERTON, MOUNT, and BRIDGES, JJ., concur.

[No. 15510. Department Two. January 7, 1920.]

EDWARD WELLS, *Respondent*, v. SAMUEL WALKER *et al.*, *Appellants.*[1]

SALES (59)—RESCISSION BY BUYER—CONDITIONS PRECEDENT—PLACING IN STATU QUO. In an action to rescind a sale or trade of an automobile, procured by fraud, inability to place the parties in *statu quo* cannot be asserted, where plaintiff offered to take back his car, and the condition of the defendant's car was such that its use was of no value to the plaintiff, and defendant raised no issue as to the value of such use.

EVIDENCE (167)—PAROL EVIDENCE—FRAUD. In an action to rescind a sale on the ground of fraud, evidence of false representations is admissible, notwithstanding the contract recited that no representation was made other than those contained in the writing.

APPEAL (462)—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Error in instructions to the jury are harmless where the verdict was only advisory.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered March 29, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action to rescind a contract for fraud. Affirmed.

[1]Reported in 186 Pac. 857.

Noah Shakespeare and *Louis A. Merrick,* for appellants.

S. A. Bostwick and *J. Y. Kennedy,* for respondent.

TOLMAN, J.—Respondent, in his amended complaint, upon which the case was tried, alleged, in substance, that he had purchased an automobile truck from appellants in reliance upon their representations that the engine was a 1915 Buick model, in good condition and perfect repair, and that the truck was capable of carrying a three-ton load over ordinary roads, which representations are alleged to have been false and fraudulently made to induce the sale. The purchase price was $500, one hundred dollars of which was paid in cash, and one hundred dollars by turning in an old machine. The remaining three hundred dollars was to be paid at the rate of twenty-five dollars per month. Four such monthly payments are alleged to have been made. The complaint also alleges a tendered return of the truck, coupled with a demand for the money paid, and the redelivery of the car turned in as part payment, or its value. This tender and demand is admitted by the answer. Respondent also pleaded a second cause of action for damages, based upon the same representations, but this cause of action was withdrawn or abandoned during the course of the trial, and need not be further referred to.

Appellants complain because the action was tried as one for the rescission of a contract procured by fraud, and assert that such an action can only be maintained when the parties can be placed in *statu quo.* Admitting the rule contended for, still we find no error in that respect, for respondent's offer to receive back the car which he turned in as part payment is admitted by the pleadings, and that he failed to offer, by his complaint or by evidence, to pay the reasonable value of the use

of the truck between the time of its purchase and the time of the rescission of the contract, is well accounted for by his testimony to the effect that he had trouble with the truck from the first, continuously. The conclusion may well be drawn therefrom that the use of the truck was of no value to him. Nor did appellants, by their answer, raise any issue as to the use of the truck or the value of such use.

Errors assigned upon the admission of testimony regarding the alleged false representations, thereby, as it is argued, permitting parol evidence tending to vary the terms of a written contract, which recites that no representations were made other than those contained therein, cannot be sustained here, because, as we have seen, this is an action for rescission of the contract on the ground of fraud. *Schroeder v. Hotel Commercial Co.*, 84 Wash. 685, 147 Pac. 417. Errors are assigned also upon instructions given and refused, but aside from finding no reversible error therein, it appears that the trial court well knew, and stated the fact to be, that, in a case of this kind, the verdict of the jury would be advisory only and not binding upon him, hence the question of instructions is immaterial here.

Appellant's main argument is directed to errors assigned upon the failure of the trial court to grant their motion to dismiss, or direct a verdict in their favor. These assignments bring up for review the evidence, which we have examined, considered and carefully weighed, and while it is conflicting, we are not prepared to say that the trial court, who heard and saw the witnesses, committed error in adopting the verdict of the jury.

The judgment appealed from is affirmed.

HOLCOMB, C. J., FULLERTON, MOUNT, and BRIDGES, JJ., concur.

[No. 15514. Department One. January 7, 1920.]

JOE YANKOV, *Respondent*, v. CHRIS LAKOS, *Appellant*.[1]

APPEAL (418)—REVIEW—FINDINGS. Findings upon conflicting evidence will not be disturbed on appeal where it cannot be said that they are against the preponderance of the evidence.

Appeal from a judgment of the superior court for King county, Jurey, J., entered March 7, 1919, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Elias A. Wright and *Sam A. Wright*, for appellant.

F. B. Carpenter, for respondent.

PARKER, J.—The plaintiff, Yankov, commenced this action in the superior court for King county, seeking recovery of $550 as a balance due him upon the sale of a fishing net by him to the defendant, Lakos. A check was given to Yankov by Lakos, drawn on the Seattle National Bank, for the purpose of paying this claimed balance due upon the purchase of the net at the time of its delivery, the other portion of the purchase price having theretofore been paid in money. Payment of the check was stopped by Lakos before Yankov presented it for payment, and it remains unpaid. Trial upon the merits in the superior court, sitting without a jury, resulted in findings and judgment awarding Yankov recovery for the whole amount of $550, from which Lakos has appealed to this court.

The principal question here presented is as to whether or not there was misrepresentation by Yankov as to the condition of the net inducing Lakos to purchase it at the agreed price, such as to entitle Lakos to damages by way of a set-off or counterclaim against

[1]Reported in 186 Pac. 848.

Yankov's claim for the balance due upon the purchase price. This question, we are convinced from the record before us, is purely a question of fact, as to which the trial court found against Lakos. We have painstakingly reviewed all the evidence and deem it sufficient to say that we cannot see our way clear to disturb the conclusion reached by the trial court. To enter upon a critical examination and discussion of the evidence in this opinion would be but to attempt to measure the credibility of witnesses who testified for the respective parties. We are quite convinced that it cannot be said that the evidence preponderates against the trial court's conclusion.

Other contentions made and briefly argued in appellant's behalf we think are not well founded and do not call for further discussion by us.

The judgment is affirmed.

HOLCOMB, C. J., MACKINTOSH, MAIN, and MITCHELL, JJ., concur.

[No. 15637. Department Two. January 7, 1920.]

THE STATE OF WASHINGTON, *on the Relation of the City of Kent et al., Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Sam B. Hill, Judge, Respondent.*[1]

CERTIORARI (6)—WHEN LIES—ADEQUACY OF REMEDY BY APPEAL. Certiorari does not lie to review a judgment enjoining a city from the prosecution of public work, on the ground that the remedy by appeal is inadequate, where it merely appears that the time for performance of the contract will expire before the appeal can be heard and the delay would cause inconvenience to the contractor and city; since the appeal will afford a complete remedy.

Application filed in the supreme court November 7, 1919, for a writ of certiorari, to review a judgment of

[1]Reported in 186 Pac. 851.

the superior court for King county, Hill, J., enjoining the prosecution of a public improvement. Denied.

T. W. Bassett and *Tucker & Hyland,* for relators.

Bausman & Oldham and *Walter L. Nossaman,* for respondent.

PER CURIAM.—The city of Kent, by resolution of its city council, declared its intention to improve one of its streets between defined termini at the expense of the property benefited. Prior to the hearing on the resolution, the owners of more than three-fourths of the property in the prescribed district protested against the improvement. The city, in disregard of the protest, ordered the improvement to be made and let the contract for the completion of the work. The protesting property owners thereupon began an action in the superior court of King county against the city and the contractor to enjoin the prosecution of the work. On a trial had after issue joined, the property owners were successful in their action, recovering a judgment in accordance with the prayer of their complaint.

In the proceeding now before us, the city and the contractor seek a writ of review of the judgment, contending that the remedy by appeal is inadequate. In support of the application, they show, in addition to the facts recited, that the improvement is much needed; that the contractor has begun preparation for the work and now has upon the ground his tools, appliances and machinery necessary for the prosecution of the work, and certain of the materials necessary to be used therein, and that the time fixed for the completion of the work will expire before a review of the judgment by appeal could be perfected and determined. There is, however, in the contract a provision for extending the

time for the completion of the work for good cause shown.

It is our opinion that no sufficient cause is stated for the issuance of the writ. This court has, in a number of cases, allowed a writ of review to issue where the delay incident to a procedure by appeal will deprive the appellant of a substantial right and prevent the enjoyment of the fruits of a successful appeal, but have denied the writ in all cases when the review on appeal will cause nothing more than inconvenience and delay. Here the showing is of the latter sort. It cannot be denied that an appeal will afford a complete remedy, and that such is the ordinary method pointed out by statute for a review of a judgment of the superior court in this class of cases.

The writ is denied.

[No. 15432. Department One. January 9, 1920.]

HANNA SANDSTEDT *et al.*, *Appellants*, v. AMERICAN CENTRAL LIFE INSURANCE COMPANY, *of Indianapolis, Indiana, Respondent.*[1]

INSURANCE (105-116)—WAIVER AND ESTOPPEL—CONDITIONS—ENGAGING IN MILITARY SERVICE—PERMISSION—EVIDENCE—SUFFICIENCY. A clause in a life insurance policy providing that the company would not be liable if death ensued while insured was engaged in the military service of the United States unless the company's permission had been obtained, is not waived by a letter directing the insured or the beneficiary to take up the matter with the local agent, where the local agent merely stated that he would send the policy and letter back to the company and get its consent and made no endorsement on the policy and no attempt to modify it, and death ensued before permission was granted and before insured had agreed to pay extra premium, as required by the company before granting the permission.

[1]Reported in 186 Pac. 1069.

Appeal from a judgment of the superior court for Franklin county, Grimshaw, J., entered December 16, 1918, upon granting a nonsuit, dismissing an action on a life insurance policy. Affirmed.

Edward A. Davis, for appellants.

E. C. Ward, for respondent.

MAIN, J.—This action was brought for the purpose of recovering upon a policy of life insurance. After the issues were framed, the cause proceeded to trial before the court and a jury. At the conclusion of the plaintiffs' evidence, the defendant interposed a motion for nonsuit, which was sustained, and a judgment entered dismissing the action. From this judgment, the plaintiffs appeal.

By a policy dated March 26, 1917, the American Central Life Insurance Company, the respondent, issued a policy of life insurance to Clarence E. Sandstedt. The beneficiary named in the policy was the insured's mother, Hanna Sandstedt, one of the appellants. The policy contained a provision that, if death of the insured should occur while engaged in the military service in time of war, or in consequence of such service, the company would not be liable under the policy unless its permission to engage in such service had been obtained. The exact language of the policy is this:

"Death while engaged in military or naval service in time of war or in consequence of such service shall render the company liable for only the reserve under this policy, unless the company's permission to engage in such service shall have been obtained and such extra premium or premiums as the company may require shall have been paid."

The policy also contained a provision that no condition or privilege of the policy could be waived or

modified in any case except by indorsement thereon signed by the president, first vice-president, the actuary, or the secretary, and that no agent had power in behalf of the company to in any manner modify the policy. The language of the policy in this respect is this:

"No condition, provision or privilege of this policy can be waived or modified in any case except by endorsement hereon signed by the president, the first vice-president, the actuary or the secretary. No agent has power in behalf of the company to make or modify this or any other policy, to extend the time for paying the premium, to waive any forfeiture, to grant any permit or to bind the company by making any promise or making or receiving any representation or information."

On August 17, 1917, the insured enlisted in the military service of the United States. During the latter part of December, 1917, a letter from the company was delivered to Mrs. Sandstedt at Pasco, whether addressed to her or to the insured does not appear, saying in effect that, if the insured had entered the military service, it would be necessary to take the letter to the local agent of the company and take up with him the matter of securing the company's consent to the policy continuing in force. Immediately after receiving this letter, Mrs. Sandstedt took it to the local agent at Pasco, who told her that he must also have the policy. Immediately thereafter the policy was delivered to him. The local agent told Mrs. Sandstedt that he would send the policy and the letter back to the company and get its consent, and send the application to the insured to have him sign it. At that time the insured was on his way to France. Subsequently the local agent told Mrs. Sandstedt he had written on the 7th of January following. On the 20th of January, the insured died in France of pneumonia while in the

military service of the United States. The evidence shows that the company was not at that time making any extra premium charge by reason of any of its policy holders being engaged in military service in time of war, but required a policy holder, before a permit was issued to engage in the service, to sign an application agreeing to pay an extra premium charge in the event that excessive mortality in that class should render it necessary. At the time of the death of the insured, no application had been signed by him and no permit to engage in the military service had been indorsed on the policy, as was required in such cases.

The theory of the appellants' case is, if we have gathered it correctly, that the company, by writing the letter which Mrs. Sandstedt received, directing that she take up with the local agent the matter of getting the company's consent for the insured to engage in the military service of the United States, and the agent's acts in pursuance of such direction, constituted a waiver in the nature of an estoppel on the part of the company of the provisions of the policy relating to the insured engaging in military service in time of war and the manner in which such provision could be waived or modified. The local agent made no indorsement upon the policy and made no attempt to modify it. He undertook, in pursuance of the letter which Mrs. Sandstedt received, to call the matter to the attention of the company and to have the application signed by the insured. Before this could be accomplished, the death occurred. There is nothing in the evidence from which it can reasonably be inferred that the agent assumed to then modify the policy or that Mrs. Sandstedt understood that he was so doing. It is not claimed that the provisions of the policy would not be controlling if they had not been modified or waived. The evidence conclusively shows that no modification

or waiver had taken place at the time of the insured's death. It must follow, therefore, that the contract, as stated in the policy, must prevail and there can be no recovery. There was no substantial evidence which would tend to establish a modification or waiver, and the ruling of the trial court in withdrawing the case from the jury was right. Had the local agent, when he received the letter delivered to him by Mrs. Sandstedt, assumed then to modify the policy under the authority of that letter, the contents of which only appear in the record by the testimony of Mrs. Sandstedt, a question would be presented which is not necessarily involved in this appeal, because, as already pointed out, the agent made no such attempt. Since the evidence shows that the agent made no attempt at modification, it is unnecessary here to discuss or decide whether, under the terms of the policy and the insurance code of this state, such power could have been conferred upon him by means of the letter referred to.

The judgment will be affirmed.

PARKER, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 15458. Department One. January 9, 1920.]

L. NOOT, *Respondent*, v. S. HUNTER, *Appellant*.[1]

MUNICIPAL CORPORATIONS (379-383, 391) — USE OF STREETS — COLLISION AT CROSSING—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. The driver of an automobile in collision with a truck at a street intersection, is guilty of contributory negligence precluding any recovery, where he was violating the speed limit and also the ordinance giving the right of way to vehicles on the right when approaching street intersections, and the driver of the truck, having the right of way, had a right to rely on the other's observance of the ordinance.

Appeal from a judgment of the superior court for King county, Hall, J., entered April 1, 1919, upon findings in favor of the plaintiff, in an action in tort, tried to the court. Reversed.

Peters & Powell, for appellant.

Morris B. Sachs and *W. R. Crawford*, for respondent.

MITCHELL, J. — This action involves a claim for property damage, and arose out of a collision between plaintiff's passenger automobile and defendant's motor truck, in the intersection of Atlantic street and Railroad avenue, in the city of Seattle. The cause was tried to the court without a jury, and defendant has appealed from a judgment in favor of plaintiff.

The collision occurred in the daytime. Respondent's driver was familiar with the scene of the accident, admitting having passed along there more than a hundred times. Railroad avenue runs north and south and on the east side thereof there existed an overhead trestle extended upon piles to accommodate a street railway. Atlantic street runs towards the west into, but not beyond, the west boundary of the avenue. As

[1]Reported in 186 Pac. 851.

it intersects the avenue on the east side, Atlantic street is divided by bents of piling supporting the trestle into what may be termed two branches, each passing under the trestle, the south branch being used in travel on Atlantic street turning south on the avenue, the other for travel to the north. Appellant's truck, running westerly along Atlantic street, intended to be driven south on the avenue, passed along the north side of the south branch of the street and entered the avenue at a speed of five or six miles an hour, as it satisfactorily appears from all the evidence, and running at right angles, crossed the avenue and collided with the automobile on the west side of the avenue.

At the time of the collision, it appears there was a space of fifteen to twenty feet between the rear of the truck and east margin of the roadway of the avenue. Respondent's automobile was going north on the east side of the avenue and, according to the testimony, lacked from twenty to one hundred feet of reaching the intersection at the time the truck entered it. Instead of controlling his car and keeping to the right, passing the truck in the rear, respondent's driver veered off to his left as if attempting to pass around in front of the truck, at a speed estimated by witnesses at from eighteen to thirty miles an hour, until stopped by the collision. Respondent's driver admitted he lacked as much as twenty feet of reaching the intersection after he noticed appellant's truck had entered it; and he also admitted his speed within the intersection was eighteen miles an hour until he applied his brakes just at the moment of the collision.

By § 16, ch. 155, Laws of 1917, p. 638, one is prohibited from driving a motor car faster than twelve miles an hour at any crossing within the main and thickly settled business portion of any city. It is alleged in the answer, and not denied in the reply, that

the intersection of Atlantic street and Railroad avenue is in the main and thickly settled business portion of Seattle. Also § 49 of the traffic ordinance of the city, affirmatively plead in the answer and not denied by the reply, provides:

"The driver shall look out for and give right of way to vehicles simultaneously approaching the street intersection from their right."

The statute and ordinance were both violated by respondent's driver. The truck, entering the intersection first on the right-hand side of respondent's automobile, had the right of way. It was the duty of the driver of respondent's automobile to have looked out for the truck and conceded it the right of way. The truck driver had the right to assume he would do this, and had no notice to the contrary until so late that even by the use of his brakes the collision could not be avoided.

We are satisfied the negligence of respondent and not that of appellant caused the damage.

Reversed, with directions to enter judgment in favor of the appellant.

HOLCOMB, C. J., MACKINTOSH, PARKER, and MAIN, JJ., concur.

[No. 15494. Department Two. January 9, 1920.]

FIRST STATE BANK OF BINFORD, *Respondent*, v. OTTO G. ARNESON *et al.*, *Appellants*.[1]

EVIDENCE (76)—BEST AND SECONDARY—LOSS OF PRIMARY EVIDENCE. Upon proof that a written instrument agreeing to assume a mortgage had been executed and that it was lost, oral proof of its contents is admissible.

MORTGAGES (102)—ASSUMPTION OF DEBT. The purchaser of mortgaged premises who assumes payment of the mortgage becomes the principal debtor and the mortgagor a surety only.

SAME (92)—RIGHTS OF ASSIGNEE—HOLDER OF COUPONS. An agent for the collection of mortgage notes who advanced and paid the amount due is entitled to recover the amount from a grantee who had assumed and agreed to pay the mortgage debt.

SAME (111) — TRANSFER OF PROPERTY—MERGER—EXTINGUISHMENT OF DEBT. A bank holding interest coupon notes as collateral security for the obligation of its cashier who had unlawfully appropriated money to pay the mortgage, in taking a deed of the mortgaged premises in which it assumed and agreed to pay the mortgage debt thereby becomes the principal debtor, and extinguished the debt of the cashier.

PLEDGES (7)—WAIVER—SALE OF COLLATERAL WITHOUT NOTICE. A bank, holding interest coupons secured by mortgage as collateral security for the debt of its cashier for appropriating money to their payment, will be presumed to have realized the amount due where it disposed of the collateral without notice to the debtor.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered January 30, 1919, upon findings in favor of the plaintiff, in an action for conversion, tried to the court. Reversed.

Danielson & Ryan, for appellants.

Oscar Cain, for respondent.

TOLMAN, J.—For some years prior to January 31, 1916, appellant Arneson had been the cashier of respondent bank, at Binford, North Dakota. At the an-

[1]Reported in 186 Pac. 889.

nual meeting in January, 1916, another was elected to succeed him, and thereafter for a short time he remained in charge until his successor should arrive and become familiar with the affairs of the bank.

Previous to this, appellants had been the owners of a tract of 320 acres of farm land, upon which they had given a first mortgage of $4,000 to the Capital Trust Company and a second mortgage for a like sum to one Tallmadge, who was the vice-president of the respondent bank, but a nonresident. The interest coupons of both of these mortgages were payable at the respondent bank. After the execution and delivery of these mortgages, the appellants sold and conveyed the land by quitclaim deed to one Hancher, who, by a separate instrument in writing, assumed and agreed to pay both mortgages, principal and interest.

No part of the principal of either mortgage had been paid on January 31, 1916, and on that day there was in the respondent bank for collection the interest coupon due on January 1, 1916, on the first mortgage, for $242 and accrued interest, and the interest coupon due February 1, 1916, on the second mortgage, for $320, both coupons being signed by appellants as makers. On that day Arneson, being still in charge of the bank pending the arrival of his successor as cashier, paid both of these coupons with the money of the bank, and deposited the uncancelled coupons in the drawer or till as cash items to balance the total amount of $563.61, which he had remitted to the payees on the interest coupons.

On February 10, 1916, the new cashier found the coupons being carried as cash, and had some conversation with Arneson regarding them. Both Arneson and his successor as cashier appear to have made unsuccessful efforts to induce Hancher to pay these coupons, and still later the bank appears to have induced

Hancher and a grantee to whom Hancher had in the meantime conveyed, in consideration of $200 then paid by the bank, to convey the mortgaged lands to the bank, and by the deed of conveyance to it, the bank assumed and agreed to pay both mortgages. Whether, in thus procuring title, the bank was acting solely as the holder of these coupon notes, or in part in the interest of its vice-president, who held the second mortgage, does not appear.

This action was brought in August, 1918, the complaint being framed upon the theory that Arneson had unlawfully and without the consent of the officers of the bank converted to his own use the sum by him remitted to the payee of the coupon interest notes as above stated. The answer, after denying such conversion, alleges in some detail the facts already recited, and alleges a custom of the respondent bank to remit in payment of interest notes sent it for collection on loans made through it, when the same became due, whether paid or not; and in effect alleges that the bank had, by assuming and agreeing to pay both mortgages, made the debt represented by these interest coupons its own.

From a judgment against them in the full amount prayed for, the appellants bring the cause here for review on appeal. Seventeen different assignments of error are made, raising many questions upon the rejection of evidence offered and refusal to make findings asked by appellants, but as we view the matter in issue, after carefully reading all the record, it will be unnecessary to discuss these assignments in detail.

Appellants admit that the money of the bank was used to pay the holders of the coupons; that there was no specific authority therefor from the directors or from any officer of the bank, and the only defense

pleaded that there was any real attempt to sustain is that the bank had assumed, and had thus become bound to pay, the amount represented by these interest coupons.

The trial court, after the proof of the loss of the written instrument by which Hancher assumed and agreed to pay the mortgages, admitted oral evidence of the contents of the lost instrument, and afterwards, on motion, struck out the evidence thus admitted. There being competent evidence that such an instrument had been executed and delivered, that due search had been made, and that it could not be found at the time of the trial, oral evidence as to its contents was properly admitted, and it was error afterwards to strike out such evidence. In the trial *de novo* here, such evidence appearing in the record, will be considered.

It appears then that, by the agreement referred to, Hancher had assumed the payment of both mortgages, and as between himself and the appellants, Hancher thus became the principal debtor, and appellants became sureties only. Therefore, when Arneson paid the coupons, no matter whose money he used, he became entitled to recover the amount paid from Hancher, and might have maintained an action at law for that purpose; or, in the event of subsequent foreclosure action, might have intervened and obtained a judgment against Hancher for the amount paid and established his right of lien on the mortgaged land, by reason of the coupons being secured by the mortgage. Likewise the bank, then holding the coupons as collateral to secure the payment of Arneson's debt to it, might have pursued the same remedies against Hancher. This being so, it follows that, when the bank accepted the deed to the mortgaged premises from Hancher, by the terms of which it assumed and agreed to pay the mort-

gages, knowing that, as against Hancher, these coupons were still unpaid and were a part of the debts secured by the mortgages and that Hancher was liable thereon, it thereby became the principal debtor as between itself and Hancher; and had Arneson pursued his remedies against Hancher, the latter could in turn have pursued like remedies against the bank. Therefore, the duty to pay and the right to receive being both vested in one person at the same time, in the absence of the rights of third parties, or other rights which equity will preserve, the one offsets and balances the other, and the obligation was thus extinguished.

Our first thought was that, in procuring title to the mortgaged premises, the bank might have been simply preserving its collateral security for the debt which Arneson owed it, which, of course, it had a right to do; but it appears here, by a certified copy of a deed offered by appellants, and erroneously rejected by the trial court, that the bank in 1918, a short time before the beginning of this action, sold and by deed conveyed the mortgaged lands. Therefore, if the coupons and the interest in the mortgaged land which they carried be considered as collateral security for the debt incurred by Arneson, as alleged in the complaint, then the bank, by selling and disposing absolutely of such collateral without notice to the debtor, will be presumed to have thus realized the amount due it from him, unless it affirmatively appears otherwise. *Gilliam v. Davis*, 7 Wash. 332, 35 Pac. 69, and authorities there cited.

For the reasons stated, the judgment of the trial court will be reversed, with directions to enter a judgment in favor of the appellants.

HOLCOMB, C. J., MOUNT, BRIDGES, and FULLERTON, JJ., concur.

[No. 15498. Department Two. January 9, 1920.]

MILL & MINE SUPPLY COMPANY, *Appellant*, v. SEATTLE FROG & SWITCH COMPANY, *Respondent*.[1]

SALES (68, 75) — PERFORMANCE OR BREACH—TENDER—INSPECTION. An offer to buy for plaintiff certain second-hand wire rope to be selected and inspected by defendant at Duluth, accepted by plaintiff, was breached when the cars tendered at Seattle were refused because not inspected and unsatisfactory, where defendant inspected and accepted some of the rope without notifying plaintiff and such inspection was a matter solely between the defendant and the Duluth dealer furnishing the rope.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered February 18, 1919, upon granting a nonsuit, dismissing an action on contract. Affirmed.

Winfield R. Smith and *Poe & Falknor*, for appellant.

C. H. Winders, for respondent.

MOUNT, J.—This action was brought to recover damages alleged to have been caused by the breach of a contract for the sale of two hundred tons of wire rope. The case was tried to the court and a jury. At the close of the plaintiff's evidence, the defendant moved the court for a nonsuit upon the ground that the evidence was insufficient to go to the jury. That motion was sustained and the action was dismissed. The plaintiff has appealed.

The sole question is: Was there sufficient evidence to go to the jury?

The facts are in substance as follows: The appellant and the respondent are corporations doing business in this state, in the city of Seattle. Robert Gillespie represented the appellant and Mr. M. J.

[1]Reported in 186 Pac. 1067.

Henehan represented the respondent in the dealings between the two companies. In October, 1916, Mr. Gillespie intended to go east to purchase supplies for his company. At that time Mr. Henehan gave Mr. Gillespie a letter to the Duluth Iron & Metal Company, of Duluth, Minnesota. Mr. Gillespie took this letter and presented it to the Duluth Iron & Metal Company, and on October 27, 1916, the Duluth Iron & Metal Company sent a telegram to Mr. Henehan, representing the Seattle Frog & Switch Company, as follows:

"Mr. Gillespie here. We offer you two hundred tons assorted sizes one and three-eighths and one and quarter and one and one-eighth wire rope, including also six reels one and three-quarter at twenty-five dollars per net ton f. o. b. Duluth. Terms ninety days and four months if desired. Mr. Gillespie will inspect and accept rope on this deal here and he is wiring you a proposition. Please answer him and ourselves promptly so loading can commence. Barde raised prices in this territory."

Upon the same day Mr. Gillespie, representing the appellant, sent from Duluth, Minnesota, the following telegram addressed to the Seattle Frog & Switch Company:

"Will buy two hundred tons good secondhand plow steel wire rope offered to you today by the Duluth Iron and Metal Co. at two and one-half cents per pound f. o. b. Seattle. Terms one thousand dollars per month starting immediately. Will inspect and accept rope here. Wire answer care Spalding Hotel."

This telegram was signed by Mr. Gillespie. On October 31, 1916, the Seattle Frog & Switch Company sent a telegram to Mr. Gillespie as follows:

"Are entering your order according your proposition and wiring Duluth ship your selection."

This was signed by the Seattle Frog & Switch Company. Upon the same day a telegram was sent by the

Seattle Frog & Switch Company to the Duluth Iron & Metal Company at Duluth, as follows:

"Ship to us Seattle via Milwaukee two hundred tons as selected by Gillespie."

After the receipt of these telegrams, Mr. Gillespie inspected and rejected some of the rope in Duluth; but this fact was not made known to the respondent or to Mr. Henehan. Mr. Gillespie thereupon left Duluth and went to Superior and other points. He returned in a few days to Duluth and inspected some of the wire rope in the possession of the Duluth Iron & Metal Company, and accepted one car. In the meantime, the Duluth Iron & Metal Company had shipped three cars of wire rope to the respondent for delivery to the appellant. When the cars arrived in Seattle they were tendered to the appellant. Appellant refused to take the rope on the cars because Mr. Gillespie had not inspected or accepted the same. The respondent thereupon took the rope and disposed of it in the market. Afterwards other cars were shipped, but none of the shipments were received by the appellant. The appellant then brought this action for damages, alleging a breach of the contract.

From the telegrams above quoted, it appears that Mr. Gillespie made the arrangements for the contract with the Duluth Iron & Metal Company in Duluth. He knew that the Duluth company would not sell direct to him, but would sell through its agent, the respondent, in Seattle. Thereupon Mr. Gillespie wired to the respondent in Seattle:

"Will buy two hundred tons good secondhand plow steel wire rope offered to you today by the Duluth Iron and Metal Co. . . . Will inspect and accept rope here. Wire answer care Spalding Hotel."

This was a plain offer to buy two hundred tons of wire rope offered that day to the respondent, appellant agreeing to inspect and accept the rope in Duluth. That offer was accepted by the respondent. Thereafter certain cars of rope were shipped to the respondent by the Duluth Iron & Metal Company for delivery to the appellant. The respondent assumed, of course, that this was the rope purchased, inspected and accepted on October the 27th by the appellant. When the cars of rope were tendered to the appellant, it refused to receive them because the rope had not been inspected and accepted in Duluth, and because the rope was not satisfactory. The place to reject the rope was in Duluth. The acceptance or rejection of the rope was a matter solely between the appellant and the Duluth Iron & Metal Company. When that company shipped the rope *that day* sold to the respondent, the appellant was bound to take it according to the offer to buy. The appellant's refusal was a breach of the contract with the respondent. The appellant sought to show upon the trial that there was a modification of the contract in that the rope might be inspected and accepted in Seattle; but we find no evidence of any such modification. In fact, so far as the respondent is concerned, there was no modification of the contract whatever. The respondent insisted that the appellant should take the wire rope that was shipped to Seattle. The appellant refused to take that rope and thereby breached the contract.

We are satisfied the trial court properly took the case from the jury and dismissed the action.

The judgment is therefore affirmed.

Holcomb, C. J., Fullerton, Bridges, and Mackintosh, JJ., concur.

[No. 15522. Department One. January 9, 1920.]

B. F. EBLING, *Respondent*, v. OTTO NIELSEN *et al.*, *Appellants*.[1]

HIGHWAYS (52) — AUTOMOBILES — NEGLIGENT USE — VIOLATION OF STATUTES. The violation of Laws 1917, p. 636, § 15, requiring a red light visible at least two hundred feet to be attached to the rear of a motor vehicle, is of itself negligence.

SAME (52, 58) — CONTRIBUTORY NEGLIGENCE — EVIDENCE — SUFFICIENCY. One driving an automobile over a straight road on a dark and rainy night, at a speed of twenty-five miles an hour, who collided with an auto-truck parked at the margin of the road with an insufficient red light, was guilty of contributory negligence, as a matter of law, where he did not apply the foot brake until twenty-five feet from the truck, or the emergency brake until within ten feet, and his car skidded into the truck although the wheels were locked.

SAME (52) — AUTOMOBILES — NEGLIGENCE — VIOLATION OF TRAFFIC LAWS. Negligence *per se* in the violation of traffic laws does not preclude the defense of contributory negligence.

Appeal from a judgment of the superior court for King county, Hall, J., entered March 7, 1919, upon findings in favor of the plaintiff, in an action for damages sustained in an automobile collision, tried to the court. Reversed.

Ogden & Clarke and *Joseph Oakland*, for appellants.

J. Speed Smith and *Henry Elliott, Jr.*, for respondent.

MITCHELL, J.—This action was brought to recover for damages to respondent's automobile on account of a rear-end collision with a large motor truck belonging to appellants. The case was tried without a jury. The court made findings and conclusions to the effect that the collision was caused by the negligence of ap-

[1]Reported in 186 Pac. 887.

pellants and entered judgment accordingly, from which the appeal is taken.

Appellants contend the weight of the evidence dismisses them from the charge of negligence and affirmatively and clearly establishes contributory negligence which denies respondent any right of recovery. Appellants are charged with a violation of that portion of the amendment of the motor vehicle act found in chapter 155, at pages 636, 637, Laws of 1917, § 15, which provides:

"Such motor vehicle shall have attached to the rear not less than one lamp showing a red light, visible at least two hundred feet in the rear of such machine, . . ."

The collision occurred on the Pacific highway, about eight miles south of Seattle, about six o'clock in the evening, November 8, 1918, at which time it was dark and a heavy rain was falling. Because of engine trouble appellants had stopped their motor truck, facing south, on the right-hand margin of the road, and had gone to procure assistance, after lighting a lamp showing a red light to the rear of the truck which was burning at the time of the collision. A boy fifteen years of age was left with the truck. There is a sharp dispute in the evidence as to the power of the red light. Appellants' proof tends to show it was sufficient, particularly so when taken in connection with the plausible contention that the reach of visibility of the red light exacted by the law does not contemplate weather conditions such as existed at the time of the accident. On the contrary, respondent's proof shows the light was very dim and insufficient. Out of the conflict the trial court was convinced in this respect against the appellants, and an examination of the evidence satisfies us it preponderates that way. A thing which is done in violation of positive law is

in itself negligence. *Engelker v. Seattle Electric Co.*, 50 Wash. 196, 96 Pac. 1039; *Ballard v. Collins*, 63 Wash. 493, 115 Pac. 1050.

We think the contributory negligence of the respondent equally manifest. The accident occurred on a straight line of the highway. Respondent, driving south, was bowling along, twenty miles an hour, in the dark, a heavy rain falling. He had a cleaner on his wind-shield, but did not know how long before the accident he had last used it. He had a traveling companion by the name of Hennesey. Respondent's own account of the manner in which the accident happened is as follows:

"When we were within about 25 feet of this truck Mr. Hennesey said, 'Ben, there is a car ahead.' I said, 'I see it,' and I put my foot on the foot brake, and when I saw I could not stop, I threw the emergency on, and when I did that we just skidded right on. I could not swing out because just about the time when we saw this there was a car coming the other way and I would have collided with the other car if I turned out suddenly from the back of the truck."

Under cross-examination he went somewhat more into details, as follows:

"Q. Did your brakes lock the wheels? A. The emergency locked the wheels because I threw it on just as hard as I could. Q. How far do you think you went after your wheels locked? A. The wheels locked within about four or five feet of the truck, I judge. The whole thing came so fast that there was very little chance to do anything but use the best judgment that you could. Q. How far were you from the truck when you first put on your foot brake? A. About 25 feet. Q. How far were you from the truck when you threw on the emergency? A. About ten feet I judge. Q. And the impact followed practically almost simultaneously? A. Yes, sir; your mind works with your feet automatically. Q. Did the emergency lock the wheels? A. Yes, sir, and I skidded right under the truck."

The same statute heretofore referred to, the amendatory act of the motor vehicle law of 1917, at pages 636, 637, § 15, provides:

"Every motor vehicle shall exhibit during the hours of darkness, at least two lamps, one on each side, showing white lights visible two hundred feet or more in advance of said vehicle."

Counsel for respondent contends the words, "visible two hundred feet or more in advance of said vehicle," show that the two white lights are intended to assist the other fellow, the one approaching, in avoiding a collision. Manifestly, however, in actual experience the headlights of an automobile do serve as a means to assist the driver in picking up within his own vision objects he approaches, and to that extent constitute an agency he must employ with due and proper care to avoid injury to himself as well as another. It happens in this case there is not a word of testimony to show that respondent had any front lights on his machine; and if he had none, then, wholly independent of any statutory law, it would have been gross negligence for him to drive his car as he did at that time and place and under the weather conditions existing. However, the presumption is that he complied with the law in this respect and we assume he was using the front lights required. Then, under the test of ordinary care and prudence, he was required to have his machine under such speed and control, considering all the circumstances, including any reasonable likelihood of skidding when the brakes were applied, as would permit him to safely handle his machine without a collision, after he could and should have discovered the motor truck, independent of the question of the sufficiency of the red light. 29 Cyc. 505; *Lauson v. Town of Fond du Lac,* 141 Wis. 57, 123 N. W. 629, 135 Am. St. 30, 25 L. R. A. (N. S.) 40.

It is a well settled rule that, if the negligent act of the defendant consist of the violation of a statute or ordinance, and although such violation is held to be negligence *per se,* it will not for that reason prevent contributory negligence from defeating recovery. *Fluhart v. Seattle Elec. Co.,* 65 Wash. 291, 118 Pac. 51; *McEvilla v. Puget Sound Tr., L. & P. Co.,* 95 Wash. 657, 164 Pac. 193; 29 Cyc. 508, paragraph 2 and cases cited. The inquiry is not so much which is the more at fault, but as tersely stated by Judge Dunbar, in *Franklin v. Engel,* 34 Wash. 480, 76 Pac. 84:

"If the injury is caused by the negligence of the defendant alone, recovery can be obtained; but if the negligence of the plaintiff contributes to the injury, such negligence bars a recovery."

Our conclusion is that respondent was guilty of contributory negligence of such pronounced and substantial sort as to bar him from any right of recovery.

Reversed, with directions to the superior court to enter judgment in favor of appellants.

HOLCOMB, C. J., MACKINTOSH, PARKER, and MAIN, JJ., concur.

[No. 15569. Department Two. January 9, 1920.]

THE STATE OF WASHINGTON, *on the Relation of W. L. Schafer, Appellant,* v. THE CITY OF SPOKANE *et al., Respondents.*[1]

MUNICIPAL CORPORATIONS (354)—LICENSES (5)—USE OF STREETS—VEHICLES—LICENSE TAX. Streets, being devoted primarily to general and public, and not special or private uses, fall within the plenary legislative powers, so that a license for the operation of motor vehicles for hire is in the nature of a concession by the public, and within the discretion of the city council to grant or withhold as shall be found for the best interests of the public.

SAME (354)—USE OF STREETS—REGULATION OF JITNEYS—STATUTES. Municipal regulation of jitney busses is not precluded by Rem. Code, § 5562-1 *et seq.*, requiring persons operating passenger motor vehicles for hire in cities of the first class to obtain a license, etc., this act being intended only as general state legislation subject to additional local legislation not inconsistent therewith.

CONSTITUTIONAL LAW (113)—EQUAL PROTECTION OF THE LAWS—CLASS LEGISLATION — CARRIERS — JITNEY BUSSES — REGULATION. An ordinance regulating jitney busses in a city does not deny the equal protection of the laws or deny to persons privileges and immunities which upon the same terms belong to other persons, in violation of the state and Federal constitutions, in that its provisions are not made applicable to street cars, taxicabs, automobiles for hire, stages running to points outside the city, and others; since the business of jitney busses differs from all these and the effect of the constitutional limitations merely is to prohibit arbitrary and unreasonable classifications, and require only that the regulations operate alike upon all those similarly affected.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered September 9, 1919, dismissing an application for a writ of mandamus to compel the issuance to relator of a license to operate a jitney bus. Affirmed.

O. C. Moore, for appellant.

J. M. Geraghty and *Alex M. Winston,* for respondents.

[1]Reported in 186 Pac. 864.

TOLMAN, J. — Appellant, as relator, brought this action seeking an order of court requiring officials of the city of Spokane to issue to him a license or permit to operate a jitney bus as a common carrier of passengers for hire over a certain fixed route in that city, described in the application therefor. The case was tried upon the pleadings and certain affidavits, from which it appears that appellant has complied with all of the statutes of the state and ordinances of the city relative to the subject-matter; is the owner of a proper motor car fitted with seating capacity for sixteen passengers; that he has duly made application to the city officials of the city of Spokane for a license permitting him to operate such motor car over a certain fixed route; that such permit was refused under the terms of ordinance No. C1916 of the city of Spokane, and in the language of the commissioner of public safety:

"The city council of the defendant city did not arbitrarily refuse to issue a license to the relator. When relator's application for a license came up for consideration by the city council it was referred to the committee of the whole council, who thereafter reported, recommending that the license be not granted. The reason for said refusal was that the said city council, after full investigation of the matter, found that the territory covered by relator's application for a license is being adequately served by local street car companies. This affiant further says that the said license is a franchise; that under the law and under the terms of the ordinance aforesaid the council has the discretion to grant or refuse licenses, and it was in the sound exercise of that discretion that the council found it for the best interests of the community and the citizens thereof that such license be not granted."

This appeal is from a judgment denying the relief sought. The ordinance in question, among other things, provides:

"Section 4. Before such permit shall be issued, the applicant shall file with the commissioner of public safety an application stating the make and number, if any, of the vehicle, the number of passengers for which it has interior seating capacity, the proposed route and schedule, and exhibit a state license for such vehicle. Such application shall be referred by the commissioner of public safety to the city council, who may grant or refuse the same." Spokane Ordinance, No. C1916.

It is first argued that the provisions of the ordinance and the action of the city council are unreasonable, arbitrary and void, and to support this contention, appellant relies upon the case of *Seattle v. Gibson,* 96 Wash. 425, 165 Pac. 109, and cases from other jurisdictions in which similar questions were involved. As we understand the law, these authorities have no application here, because they each relate to some business or vocation carried on upon private property, and not to the use of streets or other public property for the purpose of private gain. What we conceive to be the distinction between the two classes of cases is so clearly stated in *Ex parte Dickey,* 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F 840, that we quote therefrom the following:

"The right of a citizen to pursue any of the ordinary vocations, on his own property and with his own means, can neither be denied nor unduly abridged by the legislature, for the preservation of such right is the principal purpose of the constitution itself. In such cases, the limit of legislative power is regulation, and that power must be cautiously and sparingly exercised, unless the business is of such character as places it within the category of social and economic evils, such as gaming, the liquor traffic, and numerous others. To this list may be added such useful occupations as may, under certain circumstances, become public or private nuisances, because offensive or dan-

gerous to health. All of these fall within the broad power of prohibition or suppression, some wholly and absolutely and others conditionally. Such pursuits as agriculture, merchandising, manufacturing, and industrial trades cannot be dealt with at will by the legislature. As to them, the power of regulation is comparatively slight when they are conducted and carried on upon private property and with private means. But when a citizen claims a private right in public property, such as a street or park, a different situation is presented. Such properties are devoted primarily to general and public, not special or private, uses, and they fall within almost plenary legislative power and control. In them, all citizens have the usual and ordinary rights in an equal degree and to an equal extent. In the regulation thereof, the legislature cannot discriminate. But, as regards unusual and extraordinary rights respecting public properties, its power or control and regulation is much more extensive. Such rights are in the nature of concessions by the public, wherefore the legislature may give or withhold them at its pleasure, It may give them for some purposes and withhold them for others, and in the case of those given, it may, upon considerations of character, quality, and circumstances, discriminate, permitting some things of a general class or nature to be done and refusing to permit others of the same general class to be done, or extending the privilege to some persons and denying it to others because of differences of character or capacity.

"The right of a citizen to travel upon the highway and transport his property thereon, in the ordinary course of life and business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a common right, a right common to all, while the latter is special, unusual and extraordinary. As to the former, the extent of legislative power is that of regulation; but, as to the latter, its power is broader; the right may be wholly denied, or it may be permitted to some and

denied to others, because of its extraordinary nature. This distinction, elementary and fundamental in character, is recognized by all the authorities."

It is next contended that the ordinance is unconstitutional because of unequal application, and that it is in the nature of class legislation. This argument is based upon § 1 of the ordinance, which excludes from its provisions street cars, taxicabs, automobiles for hire, stages running to points outside the city, and others. This subject is fully considered in *Allen v. Bellingham,* 95 Wash. 12, 163 Pac. 18, where the court had under consideration a not dissimilar ordinance and after extensively reviewing the authorities and discussing the distinctions to be drawn between the several classes mentioned, held squarely against appellant's contention.

It is further argued that the ordinance is in conflict with the statute law, and therefore void. This precise question was also presented in *Allen v. Bellingham, supra,* exhaustively treated, and decided adversely to appellant's contention. The amendment since made, § 13, ch. 59, Laws of 1919, p. 113, does not in any way lessen the effect of that decision, nor can we find anything inconsistent therewith in *Seattle v. Rothweiler,* 101 Wash. 680, 172 Pac. 825. In *Hadfield v. Lundin,* 98 Wash. 657, 168 Pac. 516, Ann. Cas. 1918C 942, the language of the *Allen* case is quoted with approval, even to that portion of it which it was there said might be *obiter,* the court saying with reference thereto:

"That language may be said to be *obiter,* but it states the correct principles as amply sustained by authority."

Indeed, the *Allen* case answers every contention made by appellant and is absolutely controlling here. If, as appellant contends, there are features involved here which were not involved there, and if there be

language there used which was pure *obiter,* then, to cure that objection so far as we may, we now adopt and restate the language of that case and apply it to this, as follows:

"But the use to which the appellant purposes putting the streets is not their ordinary and customary use, but a special one. He purposes using them for the transportation of passengers for hire, a use for which they were not primarily constructed. As to such users we think the power of the municipality is plenary, in so far as this particular clause of the statute is concerned. It denies no form of regulation pertaining to business of this character, even to the prohibition of the business entirely."

And to sustain that language, in addition to the authorities already referred to and cases therein cited, the following may be considered: *Lutz v. New Orleans,* 235 Fed. 978; *Craddock v. San Antonio* (Tex. Civ. App.), 198 S. W. 634; *New Orleans v. Le Blanc,* 139 La. 113, 71 South. 248; *Commonwealth v. Kingsbury,* 199 Mass. 542, 85 N. E. 848, 127 Am. St. 513, L. R. A. 1915E 264; *Fifth Avenue Coach Co. v. New York,* 221 U. S. 467; *Cummins v. Jones,* 79 Ore. 276, 155 Pac. 171.

The city was within its rights in refusing a permit to operate over a route already adequately served, and the judgment of the trial court is affirmed.

HOLCOMB, C. J., FULLERTON, BRIDGES, and MOUNT, JJ., concur.

[No. 15378. Department Two. January 12, 1920.]

H. S. GILE *et al., Appellants,* v. S. TSUTAKAWA *et al., Respondents.*[1]

ARBITRATION AND AWARD (2)—AGREEMENT TO ARBITRATE—CONSTRUCTION. An agreement to arbitrate any dispute arising as to the proper fulfillment of a contract for the sale of prunes does not submit to arbitration a dispute as to the proper construction of trade terms in the contract fixing the price to be paid.

SAME (2)—CONSTRUCTION BY PARTIES—EFFECT OF TENDER. A tender to arbitrate a dispute not submitted by the arbitration agreement would not have the effect of reading the same into the contract.

SALES (6, 19)—PARTIES—RELATION TO TRANSACTION. A contract for the sale of a car load of prunes is not affected by the fact that by mistake one of the duplicate copies was made out on a printed form of another company.

SAME (19)—ESTOPPEL OR WAIVER. The purchasers of a car load of prunes are estopped to claim that their contract was with another company represented by the same broker, where, after the car was shipped and bill of lading and draft sent, they complained about the price, offering to pay part, and did not deny the contract.

CUSTOM AND USAGE (6)—EVIDENCE (159)—PAROL EVIDENCE OF TRADE MEANING. Oral evidence is admissible that the words "bulk basis" in a contract for the sale of a car load of prunes has a technical or trade meaning, generally known and recognized by the trade; especially when all the parties are connected with the trade, as they are conclusively presumed to know the trade language.

PARTNERSHIP (36)—RIGHTS AND LIABILITIES OF PARTNERS—SALES. Where the buyer of a car load of prunes and the broker had a partnership interest in the purchase and the broker knew the trade meaning of the words "bulk basis" used in the contract, the buyer, as a partner, is conclusively presumed to have knowledge thereof.

BROKERS (4)—AUTHORITY—CONSTRUCTION OF CONTRACT. A broker whose sole authority was to find a purchaser willing to buy a car load of prunes, has no authority to construe the contract or to bind the seller by representing to the purchaser that the term "bulk basis" used in the contract had any meaning other than its accepted trade meaning.

Appeal from a judgment of the superior court for King county, French, J., entered January 9, 1919,

[1]Reported in 187 Pac. 323.

upon findings in favor of the defendants, dismissing an action on contract, tried to the court. Reversed.

Glenn C. Beechler and *William H. Trindle,* for appellants.

Melville Monheimer, Van C. Griffin, and *Benj. S. Ohnick,* for respondents.

Bridges, J.—This was a suit by appellants for damages resulting from an alleged breach of contract on the part of respondents to purchase a carload of prunes. The complaint alleged that, on September 29, 1914, the plaintiffs and defendants entered into a written contract for the sale and purchase of a carload of prunes; that thereafter the plaintiffs shipped the prunes to defendants at Seattle, and they refused to take them, and that the plaintiffs were required to, and did, take possession of the prunes and sell them upon the open market at the best price they could obtain, but at a loss to them of something over $600, for which they sought judgment. The defendants, by answer, admitted that they had entered into a contract for the purchase of a carload of prunes, but that such contract was not with the plaintiffs, and that, in any event, the price charged by the plaintiffs therefor was in excess of the contract price, and for that reason they refused to pay the price demanded, but that, at all times, they have been able and willing to take the prunes at the agreed price, which they say they tendered to the plaintiffs, but that the tender was refused.

In order that the facts, which are somewhat complicated, may be more easily understood, it may be well here to give the relations of the various parties one to the other. The appellants, plaintiffs below, are copartners doing a general fruit business, with head offices at Salem, Oregon. There was also another Ore-

gon fruit concern named the Willamette Valley Prune Association, which was a corporation, also having offices at Salem, Oregon. The appellants owned seventy-five per cent of the stock of the prune association, and controlled and transacted most of its business. Both the appellants and the prune association had regular printed forms of contracts, and these forms were of the same wording, or nearly so. The defendants were copartners doing business as the Japanese-American Commission Company. The defendant Japanese-American Commission Company, a corporation, was dismissed from the action. The American Trading and Brokerage Company, a Washington corporation, was the Seattle agent and broker for both the Oregon fruit concerns, and one J. L. Elster was the business manager of the Trading and Brokerage Company. One of the defendants was a stockholder in, and officer of, this brokerage company, but had very little knowledge of its business affairs. This brokerage company had in its office at Seattle various copies of the printed contract forms of both the Oregon fruit concerns. The sale set out in the complaint was negotiated by this brokerage company. The contracts were drawn by the broker on the printed forms above mentioned and were executed in triplicate; one of the executed copies was on the printed forms of the plaintiffs, and the other two were on the printed contract forms of the Willamette Valley Prune Association. The contract gave a description of the prunes and the prices therefor in the following words:

25 Bags Italian Prunes, size 20/30	at	7c per lb.
130 Bags Italian Prunes, size 30/40	"	7c per lb.
100 Bags Italian Prunes, size 40/50	"	6c per lb.
40 Bags Oregon Petite Prunes (French) size 70/80	"	5c per lb.
35 Bags Oregon Petite Prunes (French) size 80/90	"	5c per lb.
40 Bags Oregon Petite Prunes (French) size 90/100	"	5c per lb.

Bulk basis.

This contract also contained an arbitration clause in part as follows:

"—any dispute arising as to the proper fulfillment of the contract to be settled by arbitration. . . : If the arbitrators decide that seller has not shown good faith in making delivery hereunder, the buyer shall be entitled to another tender in full compliance with this contract, or proper damages shall be awarded. Samples for arbitration shall be drawn from not less than three (3) per cent of shipment. No unimportant variation in the execution of this contract shall constitute basis for claim. In the event of failure of seller to ship, it shall be considered as a dispute to be submitted to and settled by arbitration."

It will be observed that the words "bulk basis" were used in this contract. It was contended by the plaintiffs that these words have a well understood, technical meaning in the prune trade, and that they form the basis for fixing the price of prunes, and, under the contract, the price or agreed value of the prunes sold was $3,105.77. The defendants, however, being without any knowledge that these words had a technical trade meaning, contended that the words "bulk basis," as used in the contract, should receive their ordinary meaning, to wit, that the prunes were to be shipped in bulk or in bags, and that, under the terms of the contract as so construed, the value of the prunes was a little less than $2,500. The testimony shows that, at the time the contract was entered into by the defendants, Mr. Elster, the manager of the brokerage company, informed them that the words "bulk basis," used in the contract, had nothing to do with the fixing of the prices of the prunes, but meant that they were to be shipped in bulk or in bags and that the carload of prunes which the defendants were contracting for would be worth not to exceed $2,500. It further appears that, before this contract was signed by the de-

fendants, there was an agreement between them and Mr. Elster that, if defendants would purchase a carload of the prunes, Mr. Elster would help them dispose of the shipment and that the net profits would be equally divided between them. The defendants, being unfamiliar with the prune trade, and relying on the representations made to them about the meaning of the words "bulk basis," and also because of the agreement that Elster would assist them in disposing of the prunes, executed the contract. The appellants, however, had no knowledge that these representations had been made by Mr. Elster, or of the agreement between the defendants and Elster concerning the disposition of the prunes. When the carload of prunes arrived at Seattle from Oregon, the plaintiffs demanded of the defendants $3,105.77 as the contract price therefor. This the defendants refused to pay, but tendered $2,500, which was refused. The parties were unable to get together on the price, and as a result the plaintiffs were required to, and did, repossess themselves of the carload of prunes, and placed the same in the hands of responsible brokers in Seattle for the purpose of disposing of them, and thereafter, in due course, they were disposed of at the market price, but at a loss to the plaintiffs, under the "bulk basis" price, of some $600. The testimony shows that the price of prunes is figured on eighty prunes to the pound and that this is the base; this base moves up and down according to the size of prunes over or under eighty to the pound; this movement is one-half cent per pound on each ten points up or down, the larger the prune, the greater is its value. The foregoing is an illustration of the trade meaning of the words "bulk basis."

The case was tried to the court without a jury, and, among other things, the trial court found that to the

trade the term "bulk basis," used in the contract, had a well known technical meaning and the price of various sizes of prunes was fixed thereby. The court further found that there was no meeting of the minds of the parties and, consequently, there was no contract, and that it was the duty of the plaintiffs to have offered arbitration before they finally disposed of the prunes, and that, having failed to do so, they could not maintain this action. The court further found or concluded that defendants were chargeable with constructive notice of the meaning of the term "bulk basis," as used in the prune trade. There was a judgment dismissing the suit, from which judgment this appeal is taken.

It is first contended by the respondents that the action was properly dismissed because the appellants did not seasonably offer to comply with the contract provision with reference to arbitration. In our opinion, the arbitration clause does not have any reference to such a dispute as is involved here; that clause provides that "any dispute arising as to the proper fulfillment of this contract shall be settled by arbitration." It is not claimed here that the appellants did not properly fulfill their contract. There is no dispute but that the shipment was made at the time and in the manner provided, and that the prunes were of the character represented and the quantity contracted for. The only dispute here is concerning the amount to be paid under the terms of the contract. This has nothing to do with the fulfillment of the contract, and therefore such dispute does not come within the arbitration provision. But, it is said by respondents, that appellants have construed the contract themselves to mean that they were under obligation to submit this controversy to arbitration, because they finally tendered arbitration before suit was brought. This reasoning

carries one entirely too far. The contract did not require the arbitration of this dispute, and the belated tender of arbitration could not have the effect of reading such a provision into the contract. The appellants' offer of arbitration may well have been made out of extraordinary precaution, or for the purpose of avoiding litigation, and not with the view that it was required by its contract to arbitrate.

Respondents further contend that there was no binding contract because, of the three copies executed, two were upon the printed contract forms of the Willamette Valley Prune Association and one on the printed form of the appellants. As previously indicated, the brokerage company which negotiated this sale was the broker of both the appellants and the prune association, and it had in its possession numerous blank forms of contract of both of these concerns. The manager drew the contract between the parties hereto, using the blank printed forms for that purpose. The testimony shows very clearly that the use of the printed forms of the Willamette Valley Prune Association was simply a mistake, and that there was a contract between the appellants and respondents, and that there was no contract between the respondents and the prune association. The mere fact that some of the duplicate copies of the contract were, by mistake, made on the printed forms of the Willamette Valley Prune Association cannot relieve respondents of any liability to the appellants. Besides this, the actions of the parties show the contract was with the appellants. After the car had been shipped, the appellants sent a bill to respondents and sent a draft to the bank, which was presented to respondents. They wrote appellants' attorney, complaining about the price and agreeing to honor the draft to the amount of $2,500, but did not claim that they had not made any contract with the

appellants. They even went so far as to tender the bank which held the draft the amount of money they contended was due. In fact, they seem never to have denied that the contract was with the appellants until about the time of this suit. From their actions respondents are estopped to claim they did not contract with appellants.

There is some contention that the appellants were not entitled to introduce testimony for the purpose of showing the technical meaning of the words "bulk basis," for the reason that those words were not obscure in their meaning and that they meant shipment in bulk, and that respondents, being ignorant of any trade meaning of the words, are entitled to have the words receive their usual and common meaning.

The authorities are numerous which recognize the rule that words used in a contract may be shown by parol testimony to have a technical or trade meaning, provided it be further shown that such meaning is not local but is generally known to, and recognized by, the trade. This oral testimony does not tend to vary or contradict the written contract, but merely explains it, so that the court may give the contract the meaning intended by the parties. *Cormier v. Martin Lumber Co.*, 98 Wash. 463, 167 Pac. 1105; *Pacific Coast Elevator Co. v. Bravinder*, 14 Wash. 315, 44 Pac. 544; *Miller v. Wiggins*, 19 Am. & Eng. Ann. Cas. 942; 17 Cyc. 685; Jones, Evidence (2d ed.), § 456; 1 Elliott, Evidence, § 608; 2 Wharton, Evidence (3d ed.), § 962. And the foregoing is the rule even where the words might be given their customary meaning and still leave the contract intelligible, particularly when all parties to the contract are connected with the trade, for every person connected with the trade is presumed to know the technical meaning of trade words or terms. See above authorities; also *Meighen v. The Bank*, 25 Pa. St. 288;

United States Life Ins. Co. v. Advance Co., 80 Ill. 549; *Armstrong v. Chemical Nat. Bank*, 83 Fed. 556; *Baer v. Glaser*, 90 Mo. App. 289; *Soutier v. Kellerman*, 18 Mo. 509; *Daniel v. Maddox-Rucker Banking Co.*, 124 Ga. 1063, 53 S. E. 573; *Williams v. Burdick*, 63 Ore. 41, 125 Pac. 844, 126 Pac. 603.

From these conclusions, it should logically follow that one dealing in a business or trade must be conclusively presumed to know and understand the language of such trade or business, when it is shown that such language is generally used and known in the trade, and his ignorance will not protect him, unless knowledge of such ignorance be brought home to the party with whom he is dealing. To hold otherwise would be to condemn long established customs and make uncertain and unstable contracts made in accordance therewith. We think that, under the circumstances of this case, the respondents were conclusively presumed to have entered into the contract with knowledge of the trade meaning of the words "bulk basis." But there is another reason why respondents must be conclusively presumed to have knowledge of the trade meaning of those words, and that is, that there was an arrangement, as above noted, between the respondents and Elster, the broker, whereby they, in effect, became partners in this transaction, and the trial court justly found that Elster had actual knowledge of the trade meaning of these words. Under these circumstances, the knowledge of Elster would be the knowledge of the respondents. It was doubtless upon this theory that the trial court found that respondents had constructive notice of the trade meaning of the words.

But the respondents contend that the appellants are bound by the meaning of the words "bulk basis" as given by their broker, Elster, to them that the words, in effect, meant shipment in bulk or sacks. A broker

is one who is engaged for others on a commission to negotiate contracts relative to property with the custody of which he has no concern. 9 C. J. 508; 4 R. C. L. 242. Of course, the broker's principal may give him more extensive powers, but there is no evidence in this case tending to show that Elster, the broker, had any greater powers than those above mentioned. His sole authority was to find persons willing to purchase the appellants' prunes upon terms and conditions fixed by appellants. He would not have any authority to change or modify the appellants' terms or prices, nor would he have any authority to construe appellants' contracts in such a way as to bind appellants. 4 R. C. L. 269; 9 C. J. 525, 526. We therefore hold that the broker went beyond his authority and power when he undertook to construe the appellants' contract, and the appellants are not bound by anything the broker may have said in that regard. But if it should be held that ordinarily the representations of the broker as to the meaning of these words would be binding upon the appellants, they could not be so here, because there was, at least, a limited partnership between respondents and Elster, and the representations made by Elster to respondents were representations made by one partner to another.

The conclusions to which we have come induce us, not only to reverse the case, but to direct the trial court to set aside its findings, conclusions and judgment, and make new findings, conclusions and judgment in accordance herewith, and which will give to appellants a judgment for the full amount they sue for, less any commissions which they may have paid to persons disposing of the car of prunes.

It is so ordered.

HOLCOMB, C. J., MACKINTOSH, and MOUNT, JJ., concur.

[No. 15433. Department Two. January 12, 1920.]

ED H. PARR, *Executor etc., Appellant,* v. DORA M. CAMPBELL *et al., Respondents.*[1]

DEEDS (21-1, 63)—VALIDITY—MENTAL CAPACITY—EVIDENCE—SUFFICIENCY. A finding of mental capacity on the part of a woman aged eighty to execute a deed to her daughter, with whom she had made her home for years, is sustained, although relatives testified she was childish, where disinterested witnesses testified to facts showing more than ordinary mental capacity for one of her age.

SAME (21-1, 63)—VALIDITY—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY. A finding that a woman eighty years of age was not unduly influenced by her daughter with whom she had resided for years, to execute a deed to her, is sustained by evidence of her sense of obligation to her daughter and repeated expressions of her intent to compensate her; it not being undue influence for a daughter to persuade or solicit her mother to make a conveyance, so long as she was not overborne or rendered incapable of acting upon her own motives.

Appeal from a judgment of the superior court for Grays Harbor county, Abel, J., entered December 14, 1918, in favor of the defendants, in an action to set aside a deed, tried to the court. Affirmed.

Morgan & Brewer and *Chas. W. Smith,* for appellant.

Wm. E. Campbell, for respondents.

FULLERTON, J.—On July 26, 1915, Mary J. Counts executed and delivered to her daughter, Dora M. Campbell, a deed to certain real property situated in the city of Hoquiam. She died in the state of California on December 25 of the same year. Ed H. Parr, her son, was named in her will as executor thereof, and duly qualified as such. After his qualification as executor, Parr began the present action against Mrs. Campbell and her husband and one Amelia F. Felzer

[1] Reported in 186 Pac. 858.

to set aside the deed, averring in his complaint that Mrs. Counts, at the time of its execution, was greatly enfeebled in mind and body, incompetent to manage her own affairs, and was induced to execute the deed by the exercise of undue influence and the unlawful exercise of the art of persuasion on the part of Mrs. Campbell and her husband, and that the deed was executed without consideration; averring further that Amelia F. Felzer claimed some interest in the property.

Mrs. Campbell and her husband answered by a general denial. The other defendant answered to the effect that she had no knowledge of the matters and things set forth in the complaint, and that she had, without such knowledge, taken a mortgage upon the property to secure a loan made by her to the Campbells, praying a foreclosure of her mortgage. The cause was tried to the court as one of equitable cognizance, and resulted in a decree sustaining the conveyance and foreclosing the mortgage. The executor appeals.

The only questions we have found it necessary to discuss are two, namely: first, was Mrs. Counts, at the time of making the conveyance, mentally incompetent; and second, was she induced to make the conveyance because of undue influence exercised over her by the grantee and her husband. The evidence discloses that Mrs. Counts purchased the property in question from one of her sons in the year 1912, paying the purchase price in cash. She took possession of the property and lived there for a time with the daughter to whom she afterwards conveyed it, the daughter then being unmarried. The date of the daughter's marriage is not shown, nor is it shown whether the daughter left the home after her marriage, although it is stated by one of the witnesses that she returned with her husband to her mother's residence in 1913

and lived with her until after the execution of the conveyance. At the time of the conveyance, Mrs. Counts was upwards of eighty years of age. In the month of January preceding that time, she fell and fractured a bone in her leg. While convalescing from the injury she had an attack of pneumonia, and while the fever was highest showed some delirium. After she recovered from this illness, she again fell and injured her shoulder, and at the time of the execution of the deed was unable to walk, except perhaps to a limited extent with crutches, and was usually taken about in a wheeled chair. After the execution of the deed, she went to California to the home of another daughter, where she died, as before stated.

The evidence of her incapacity consists of the statements of her immediate family to that effect, and to the effect that she was exceedingly childish. No specific instances of mental aberration or excessive childishness are pointed out, nor are any instances recited where she talked irrationally. The statements are general and voice only the opinion of the witnesses derived from her general acts and conduct, the principal act being, as we are inclined to believe, the execution of the deed to this particular daughter. Even one of these, who saw her in California a few months prior to her death, testifies that while she was childish, she was then in her right mind and competent to make a deed to real estate.

The evidence of the unrelated witnesses is all to the effect that she was not different mentally from the ordinary woman of her age. The witnesses were the pastor of her church, who made it a part of his duty to frequently call upon her, the physician who attended her in her illness, a banker to whom she had intrusted the business of loaning her money, and the notary who took her acknowledgment to the deed. They testify

to facts which show her not only to possess ordinary mental capacity, but capacity, it seems to us, unusual in one of her extreme age.

Nor did she execute the deed upon a sudden impulse or without thought or deliberation. On the contrary, she mentioned the matter to her pastor on one of his visits, in which she spoke tenderly of her daughter's conduct, mentioning the care she was to the daughter, her sense of obligation to her and her desire to do something for her. The pastor testifies that he was not visiting her for the purpose of discussing her business affairs, and passed the matter over by telling her that whatever she thought was right would no doubt be the proper thing for her to do. He says he did, however, discourse with her on religious and general subjects, and as to those she manifested no mental weakness whatsoever. A few days before the execution of the deed, she called in her son, the appellant in this proceeding, and made known to him her intention to execute the deed. He undertook to dissuade her from such a course, and testifies that, when he left her, he had her promise that she would not execute the deed. The notary who took the acknowledgment to the deed testifies that he prepared the deed at the request of the grantee's husband, and at his request went to the grantor's home with him to have it executed; that he found the grantor sitting in a chair apparently suffering from some physical injury, although mentally bright; that he had quite a conversation with her, in which she expressed to him her sense of obligation to her daughter and her desire to do something for her, and that she executed the deed after he had fully explained to her its purposes and legal effect. Mrs. Counts at this time owned another house and lot in the city of Aberdeen which she was renting. The house was out of repair in such a way

as to affect its rental value. As a part consideration for the deed to her daughter, she required her son-in-law to put the house in repair. Seemingly, if she was so far mentally incompetent as not to know the effect of her act of executing the deed, she would have been so far mentally incompetent as not to have been capable of bearing in mind the condition of this house.

Aside, therefore, from her extreme age and her bodily infirmities, there is little in the record to indicate mental incompetency. While these are evidentiary facts, they are not in themselves conclusive, and we think their effect is overcome in this instance by the positive proofs. It is perhaps unnecessary to add that natural love and affection between mother and daughter is a sufficient consideration to sustain a conveyance. We conclude, therefore, that the trial judge did not err in holding that the grantor had sufficient mental capacity to execute the deed.

The contention that the deed was the result of undue influence on the part of the grantee and her husband, we think is likewise without foundation. The evidence in support of the fact consists also of the statements of her immediate family. The executor testifies that, in the conversation with her, heretofore referred to, she stated to him that the daughter and her husband requested the deed, but even he states the fact in the alternative, his language being: "She (the mother) said that Mr. and Mrs. Campbell wanted her to deed them that place and I asked her for what reason. She said they had taken care of her and thought they should have it. She had no money left and wanted to deed this place to them, or they wanted her to deed it to them." The daughter in California at whose home she died, and another daughter, who visited her while at that home, testify to declarations of the mother to the effect that she had deeded the property because

of the importunities of, and because of her fear of, Mrs. Campbell. They do not purport to give her exact words, but give the substance of the declarations only, and these do not show the nature of the importunities, further than that Mrs. Campbell had scolded because she hesitated to execute the deed. Their evidence was taken by deposition, and it is a significant fact that even these show that they had no very kindly feeling toward the sister who had obtained the property. Much is made of the fact, also, that Mrs. Counts left for California shortly after executing the deed. It is said that the Campbells "induced" her to go. But we find nothing to support this assertion. On the contrary, the evidence of the daughter at whose home she was at the time of her death indicates that she went of her own free will. Another says that she was only visiting, and "was anxious to go home."

Opposed to this evidence is the declarations heretofore referred to, made by the grantor to the pastor of her church and to the notary who took the acknowledgment of the deed. These, in our opinion, more naturally express her true state of mind. This was the daughter who had always remained in her household. Common observation teaches us that a woman of her advanced age, for many years preceding her death, would have required much watchful care and attention, and that, subsequent to her injury, this care and attention would have been almost constant. Mrs. Campbell had furnished her with this, and it is not unnatural that she should have felt that it deserved reward. Nor is it undue influence for a daughter to persuade or solicit her mother to award her a greater part of her estate than is awarded to other members of the family. Influence becomes undue only when it overcomes the will of the grantor; when the grantor acts under such coercion that his own free agency is

destroyed. The grantor's views may be radically changed by the influence exercised, but so long as he is not overborne and rendered incapable of acting upon his own motives, his acts are his own acts, not those of another. The evidence here is, to our minds, far from convincing that the grantor acted otherwise than of her own free will.

The judgment is affirmed.

HOLCOMB, C. J., TOLMAN, MOUNT, and BRIDGES, JJ., concur.

[No. 15442. Department One. January 12, 1920.]

J. W. WILLIS, *Respondent*, v. E. G. GERKING, *Appellant*.[1]

ANIMALS—TRESPASSING—"RUNNING AT LARGE"—KNOWLEDGE AND CONSENT OF OWNER—DAMAGES—STATUTES—CONSTRUCTION. Treble damages for injuries committed by trespassing swine, "suffered to run at large," under Rem. Code, § 3174, cannot be recovered on mere proof of the trespass, it being necessary to show that they were running at large with the consent or knowledge of the owner; "suffer" meaning to "permit."

Appeal from a judgment of the superior court for Okanogan county, Neal, J., entered May 17, 1917, upon findings in favor of the plaintiff, in an action for damages for trespass, tried to the court. Reversed.

Joseph A. Merva and *Smith & Brown*, for appellant.

J. W. Graham, for respondent.

PARKER, J. — The plaintiff Willis commenced this action in the superior court for Okanogan county, seeking recovery of damages which he claims to have suffered from the destruction of his grain by hogs belonging to the defendant Gerking, while the hogs were

[1] Reported in 186 Pac. 1064.

trespassing on plaintiff's land on two different occasions. Treble damages in the sum of $201.45, and further damages of fifty cents per day for the feed and care of the hogs from November 23, 1916, were claimed by plaintiff under Rem. Code, § 3174, reading as follows:

"If any swine shall be suffered to run at large in any county of this state contrary to the provisions of this act, and shall trespass upon the land of any person, the owner or person having possession of such swine shall be liable for all damages the owner or occupant of such land may sustain by reason of such trespass; and for a second or subsequent act of trespass by such swine, such owner or person shall be liable for treble the amount of damages done by the same."

Trial in the superior court sitting without a jury resulted in findings and judgment awarding to plaintiff recovery for the first trespass in the sum of $10, and for the second trespass in the sum of $40. The latter amount being trebled by the court, the judgment was rendered for $130. From this disposition of the case, the defendant has appealed to this court.

The only question here presented which we deem worthy of serious consideration is as to whether or not the trial court erred in awarding treble damages for the second trespass. The trial court made no special findings touching the question of the hogs being "suffered to run at large," finding only that the hogs trespassed upon respondent's land and caused the damages complained of, on October 30 and November 14. The judgment seems to have been rested by the trial judge upon the theory that the fact of the trespass was of itself sufficient to call for the conclusion that the hogs were "suffered to run at large" by appellant, their owner, at the time of each trespass.

This court has adopted the view, in harmony with

the law generally announced elsewhere in this country, that when a statute awards damages in a greater amount than is actually suffered by the injured party, the statute is in that respect penal in its nature, is to be strictly construed in favor of the defendant, and the plaintiff must clearly bring himself within its provisions in order to recover more than his actual loss. Such was in substance the holding in *Gardner v. Lovegren*, 27 Wash. 356, 67 Pac. 615, where the question was reviewed and a number of decisions by the courts of other states noticed. Now it seems plain that while appellant is in any event entitled to recover damages in this case measured by his actual loss, he is not entitled to recover treble damages for the second trespass unless the hogs were, at the times in question, "suffered to run at large" by appellant, their owner, within the meaning of § 3174. Counsel for respondent argues, and the trial court seems to have held, that the mere fact that the hogs trespassed upon respondent's land, off the land of appellant, is conclusive that they were then "suffered to run at large" by appellant, regardless of his intent or knowledge of their being at large, and even regardless of his negligence resulting in their being at large.

It seems to us that the words "suffered to run at large," as used in Rem. Code, § 3174, in so far as these words touch the question of treble damages, mean to run at large as the result of the knowledge and consent of the owner. Of course it may be that such knowledge and consent might be inferred from gross negligence on the part of the owner in connection with his attempted or pretended restraining of his hogs—that is, his restraining of his hogs might be of such a nature that it could be said to constitute only a mere pretence in that regard, and amount, in effect, to his consent to their running at large. But

we have no finding of the trial court here touching the question of consent on the part of appellant to his hogs running at large, and a reading of the evidence convinces us that there is nothing therein that warrants any finding upon this question against appellant. We think there is nothing in this record lending substantial support to the contention of counsel for respondent that the hogs were "suffered to run at large" by appellant, other than the fact that the hogs committed these two trespasses.

In *Decker v. McSorley,* 116 Wis. 643, 93 N. W. 808, the court had under consideration a city ordinance making it a punishable offense for the owner of a horse to "permit" it to run at large in the city, the court holding, in substance, that, in order to render the owner guilty under the ordinance, the horse must be at large with the knowledge and assent of the owner. In *Ball Ranch Co. v. Hendrickson,* 50 Mont. 220, 146 Pac. 278, there was involved the question of a ram running at large in violation of the statute of that state. Among other observations made by the court in that decision, we note the following:

"Section 1881 is as follows:

" 'It is unlawful for any owner or person having the management or control of any ram or he-goat to permit the same to run at large between the first day of August and the first day of December of each year.'

"Section 1882 provides a penalty for violation of the provisions of Section 1881. To permit the ram or he-goat to run at large constitutes the offense under the statute, and not alone the running at large. The chief difficulty encountered in construing the statute seems to be in determining the proper definition of the word 'permit' as used therein. 'The language (of a statute) is to be understood in its usual and ordinary significance.' *Osterholm v. Boston & Mont. C. C. & S. Min. Co.,* 40 Mont. 508, 528, 107 Pac. 499, 505.

Webster's definition of the word 'permit' is: 'To allow by tacit consent, or by not hindering; take no steps to prevent; consent tacitly to.' Other judicial definitions to the same effect can be found in Words and Phrases, some of which are: 'To allow by not prohibiting.' 'Permit means not to prohibit or prevent.' These definitions, we believe, show the usual and ordinary significance of the word 'permit.' Accepting them as correct, we are forced to the conclusion that if a ram or he-goat run at large without the tacit consent of those in control, or if those in control make a reasonable effort to hinder or prevent such animals from running at large, then no offense has been committed under the statute."

We think these remarks of the Montana court are equally applicable to the word "suffer" as used in Rem. Code, § 3174. The Standard Dictionary defines "suffer" as follows:

"To refrain from forbidding or preventing; grant leave or assent to; permit; allow; tolerate; let;"

We conclude that the trial court fell into error in awarding respondent treble damages for the loss resulting to him from the second trespass of the hogs; and that he was entitled only to his actual loss of $40 resulting from that trespass, and his actual loss of $10 resulting from the first trespass. The judgment is, to this extent, reversed, and the cause remanded to the trial court with directions to correct its judgment accordingly, by awarding respondent a total recovery of $50 only. Appellant is awarded his costs incurred upon this appeal to this court.

HOLCOMB, C. J., MACKINTOSH, MITCHELL, and MAIN, JJ., concur.

[No. 15449. Department One. January 12, 1920.]

AUSTIN READY *et al., Respondents,* v. D. J. McGILLIVRAY *et al., Appellants.*[1]

APPEAL (145)—PRESERVATION OF GROUNDS—EXCEPTIONS TO FINDINGS—NECESSITY. Where the findings in a decree of foreclosure are not commingled with the decree proper and are separately stated and numbered, there can be no review of the evidence on appeal, when not excepted to, where no part of the error relied upon is the rejection of evidence; since Rem. & Bal. Code § 382, providing that exceptions are not necessary to rulings embodied in a written judgment, also provides that this section shall not apply to findings of fact in a decision of a court or judge tried without a jury, and Id., § 1736, precludes any review of the evidence in the absence of exceptions to the findings.

SAME. Where findings are made in an equity case, although unessential, it is necessary that exceptions be taken in order to obtain a review of the evidence.

SAME (147)—EXCEPTIONS TO FINDINGS—EXCLUSION OF EVIDENCE. Error in the exclusion of evidence may be reviewed on appeal regardless of exceptions to the findings.

Appeal from a judgment of the superior court for Grant county, Hill, J., entered January 3, 1919, upon findings in favor of the plaintiffs, in an action to quiet title, tried to the court. Affirmed.

F. A. McMaster, for appellants.

Cordiner & Cordiner, for respondents.

PARKER, J.—The plaintiffs, Ready and wife, commenced this action in the superior court for Grant county, seeking a decree quieting title in themselves, as against the claim of the defendants, McGillivray and wife, to certain lands in that county. A trial upon the merits in that court resulted in findings and decree in favor of the plaintiffs as prayed for, from which the defendants have appealed to this court.

[1] Reported in 186 Pac. 902.

If we were called upon to review this record looking to the determination of the question of the correctness of the trial court's decree, upon the merits of the case, we think it would appear that our efforts in that behalf would be little else than an attempt to measure the credibility of the several witnesses whose conflicting testimony was given upon the trial for the respective parties to the action. Indeed, counsel for appellants concede that, in so far as the merits of the case is concerned, the questions here to be determined are only questions of fact. That, however, would be a long story, which, in view of the trial court's findings of fact and the want of exceptions thereto, need not be related here.

The findings of fact and the decree based thereon are embodied in a single writing, signed by the trial judge at the conclusion of the decree. This writing has the usual introductory recitals of findings and decrees, which introductory recitals conclude with the words, "the court finds the following facts." Then follows, in six separately numbered paragraphs, findings of fact in language so full, specific and certain that there could be no room for arguing that they would not be sufficient as findings of fact supporting the decree if they were embodied in a separate writing and signed by the trial judge as findings of fact. Immediately following these findings, embodied in an additional paragraph, is the decree based thereon, commencing with these words: "Now, therefore, by reason of the law and the premises aforesaid, it is hereby ordered, adjudged and decreed by the above entitled court that . . ." No exceptions of any nature were ever taken to these findings on behalf of the appellants.

Counsel for respondents now contend that the findings of the trial court, so made, are conclusive upon appellants and are not reviewable in this court, be-

cause they were not excepted to in the trial court. Counsel for appellants contend to the contrary, his principal argument being that, since the findings were embodied in a single writing with the decree, they are not findings of fact to which exceptions are necessary to be taken in order to challenge their correctness upon appeal in this court. In *Harbican v. Chamberlin,* 82 Wash. 556, 144 Pac. 717, Judge Ellis, reviewing this identical question, speaking for the court, said:

"The appellants claim that no exceptions were necessary because the findings were included in the decree. The findings, however, were not commingled with the recitals of the decree proper, but were separately stated and numbered. They were followed by the decree which was introduced by the words, 'Now, therefore, it is hereby ordered, adjudged and decreed.' They were evidently intended as the findings of fact upon which the decree was based. The case is thus distinguished from *McAllister v. McAllister,* 28 Wash. 613, 69 Pac. 119, and *Hagen v. Bolcom Mills,* 74 Wash. 462, 133 Pac. 1000, 134 Pac. 1051, in which, as the opinion in each case shows, no recitals which could properly be denominated findings of fact were either separately made or included in the decree. The statute provides:

" 'It shall not be necessary or proper to take or enter an exception to any ruling or decision mentioned in the last section which is embodied in a written judgment, order or journal entry in the cause. But this section shall not apply . . . to findings of fact or conclusions of law . . . in a decision of a court or judge upon a cause or part of a cause, either legal or equitable, tried without a jury. Rem. & Bal. Code, § 382 (P. C. 81 § 671).'

"This section, and § 1736 of Rem. & Bal. Code (P. C. 81 § 1225), clearly preclude any review of the evidence in the absence of exceptions to the findings, though included in the decree, where, as here, no part of the error relied upon is the rejection of evidence."

It is true this is an equity case in which it was not necessary for the trial court to make findings at all in

order to support its decree. *Clambey v. Copeland,* 52 Wash. 580, 100 Pac. 1031; *Wishkah Boom Co. v. Greenwood Timber Co.,* 100 Wash. 472, 171 Pac. 234; *In re King's Estate,* 102 Wash. 299, 172 Pac. 1167. We have repeatedly held that, where findings of fact are made in an equity case, exceptions must be taken to such findings in order to secure a review of the trial court's conclusions reached therein. *Hagen v. Bolcom Mills,* 74 Wash. 462, 133 Pac. 1000, 134 Pac. 1051. *Harbican v. Chamberlin,* above quoted from, was also an equity case.

Error is assigned upon the exclusion of certain evidence offered in behalf of appellants. No argument or citation of the portion of the record upon which this assignment is based is made in the brief of counsel. We feel warranted in disposing of this claim of error by simply saying that it is without merit. If this claim of error were well grounded, we could not ignore it because of the want of exceptions to the court's findings. We make this observation to the end that it be made clear that we do not want to be understood as receding from our holding in *Berens v. Cox,* 70 Wash. 627, 127 Pac. 189, wherein Judge Morris, speaking for the court, said:

"It might be that the facts found by the court are properly found under the evidence admitted, and there is no occasion to take exceptions to facts admittedly correct in the light of the evidence received; whereas evidence excluded by the court might, if admitted and considered, change the character of the findings. Hence, it has been held in *Schlotfeldt v. Bull,* 17 Wash. 6, 48 Pac. 343; *Lilly v. Eklund,* 37 Wash. 532, 79 Pac. 1107; *Bringgold v. Bringgold,* 40 Wash. 121, 82 Pac. 179; *Smith v. Glenn,* 40 Wash. 262, 82 Pac. 605; *Pederson v. Ullrich,* 50 Wash. 211, 96 Pac. 1044, that, even though exceptions were not properly taken to the findings, this court would refuse to strike the statement

of facts when it appears that error is alleged in the exclusion of evidence."

We conclude that the judgment of the trial court must be affirmed. It is so ordered.

HOLCOMB, C. J., MITCHELL, MAIN, and MACKINTOSH, JJ., concur.

[No. 15506. Department Two. January 12, 1920.]

TOWN OF GOLD BAR, *Respondent*, v. GOLD BAR LUMBER COMPANY *et al.*, *Appellants*.[1]

DEEDS (25-1-31)—CONSTRUCTION—GENERAL RULES. In ascertaining the intent of a deed some meaning should be given to every expression, if it can reasonably be done, not inconsistent with the general intent, and if ambiguous, the construction given by the parties may be considered.

SAME (34)—PROPERTY CONVEYED. A water deed of "the right of way and pipe line or gravity system" of the grantor within the corporate limits of a city does not include service pipes outside the city limits, used by the grantor in connection with its mill; "or gravity system" being merely synonymous with right of way and pipe line within the city, especially where the parties had so construed the deed.

SAME (45)—EXCEPTIONS—OPERATION AND EFFECT. In a water deed, conveying a right of way across a school section, an exception of the school section from the warranty clause does not operate to exclude things not contained within the description actually sold.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered August 27, 1918, upon findings in favor of the plaintiff, in an action for conversion, tried to the court. Reversed.

Peters & Powell, for appellants.

Cooley, Horan & Mulvihill, for respondent.

MOUNT, J.—This action was brought to recover the value of certain pipes and water connections, alleged

[1] Reported in 186 Pac. 896.

to have been converted by the defendants. The case was tried to the court without a jury, and resulted in a judgment in favor of the plaintiff for $275. The defendants have appealed.

The facts are as follows: The Gold Bar Lumber Company owns and operates a large sawmill outside of the corporate limits of the town of Gold Bar, in Snohomish county, this state. Prior to the 23d day of September, 1913, the Gold Bar Lumber Company had constructed a gravity water system through which it furnished water to its mill plant and then to the inhabitants of the town of Gold Bar. On the 23d day of September, 1913, the Gold Bar Lumber Company sold and conveyed its gravity water system to the Gold Bar Light and Water Company, a corporation. The deed of conveyance described the property conveyed as follows:

"The water rights on Olney creek; the right of way and the pipe line or gravity water system located and situated on the northeast quarter (NE¼) of section thirty six (36) tp. twenty eight (28)—range eight (8) —thence through [Here follows a description of a number of Government lots and quarter sections in section 31, township 28, range 9, and a number of quarter sections in section 6, township 27, range 9, through which the pipe line runs]—to corporate limits of the town of Gold Bar, thence on Railroad avenue east to the intersection of Eighth street, and on First street from the intersection of Railroad avenue north to Lewis avenue, thence on Lewis avenue east to Fifth street, thence south on Fifth street to Railroad avenue, intending hereby to convey all the pipe lines, right of way and hydrants of said gravity water system within the corporate limits of the town of Gold Bar, Snohomish county, Washington.

"Together with the tenements, hereditaments and appurtenances thereunto belonging to or in anywise appertaining.

"To have and to hold the said premises, with the tenements, hereditaments and appurtenances unto the said party of the second part, its heirs and assigns, forever."

Then follows the usual warranty, from which is excepted a portion of the lands in section 36. The Gold Bar Light and Water Company operated the plant until the 21st day of June, 1917, when, by bill of sale and warranty deed, it sold and conveyed the water system to the town of Gold Bar. While the plant was being operated by the Gold Bar Light and Water Company, that company refused to make any repairs to the pipe lines within the Gold Bar Lumber Company's yards. On one occasion, when there was a leak in the main pipe line, the water company made the repair, but refused to make repairs to pipes leading from the main line within the yards of the Gold Bar Lumber Company. In the month of February, 1918, the Gold Bar Lumber Company dug up and removed certain pipes and water connections within their yards and converted these water pipes and connections to their own use. The town of Gold Bar then brought this action to recover the value of the pipes and connections so dug up by the Gold Bar Lumber Company, claiming to own the same. The trial court was of the opinion that the pipes, connections and hydrants within the yards of the Gold Bar Lumber Company were a part of the system, and for that reason gave judgment in favor of respondent.

Respondent contends that the intent of the parties must primarily be gathered from a fair consideration of the deed, and the language employed therein should be consistent with the terms of the deed, including its scope and subject-matter; that the object, in construing the deed, is to ascertain the intention of the par-

ties, especially that of the grantor; that some meaning should be given to every word, clause and expression, if it can reasonably be done and if it is not inconsistent with the general intent of the whole instrument, so that the deed may operate according to the intention of the parties; that where a deed is of doubtful meaning, or the language used is ambiguous, the construction given by the parties themselves, as elucidated by their conduct or admissions, will be deemed the true one unless the contrary be shown. We think this is the correct rule to be followed in construing the deed. With this rule in mind, let us consider the provisions of the deed from the Gold Bar Lumber Company to the Gold Bar Light and Water Company; for, if the Gold Bar Light and Water Company did not acquire from the Gold Bar Lumber Company the service pipes, connections, hydrants and stand pipes within the yards of the Gold Bar Lumber Company, then the town of Gold Bar did not acquire them, because the town acquired no greater interest than the Gold Bar Light and Water Company had. It will be noticed that the deed from the Gold Bar Lumber Company to the Gold Bar Light and Water Company contained several items of description—

First: "The Water Rights on Olney Creek;"

Second: "the Right of Way and the Pipe line or Gravity Water System located . . ."

Third: "intending hereby to convey all the pipe lines, Right of Way and Hydrants of said Gravity Water System within the corporate limits of the town of Gold Bar, Snohomish county, Washington."

The respondent argues that the words, "or Gravity Water System," used in the second description above set out, include the whole system—everything in connection with it; that this phrase is broad enough to cover every article connected with the water plant. This, no doubt, would be true ordinarily, but in this

description the words used are as follows: "the Right of Way and the Pipe line or Gravity Water System." We think the use of the words "or Gravity Water System" was simply another way of describing the right of way and the main pipe line. This right of way and pipe line was the source of supply of water. It constituted a gravity system. That is to say, the water was supplied to the town by gravity flow through this pipe line. We think it does not necessarily follow from the use of the words "or Gravity Water System," as here used, that anything more than the pipe line and right of way was meant. Furthermore, in the latter part of the description it is said:

"intending hereby to convey all the pipe lines, Right of Way and Hydrants of said Gravity Water System within the corporate limits of the town of Gold Bar, . . ."

If the contention of the respondent is correct, that the second description, as follows: "the Right of Way and the Pipe line or Gravity Water System," included the whole system, then the words in the subsequent part of the description: "within the corporate limits of the town of Gold Bar," were entirely superfluous. We think it is clear that the meaning of this deed was that the grantor conveyed the water rights on Olney creek, the right of way and pipe line of the system, and all the pipe lines, right of way and hydrants of the gravity water system within the corporate limits of the town of Gold Bar, and did not include the service pipes used by the Gold Bar Lumber Company within its yards. The evidence shows without dispute that, after this deed was made, the parties construed it as not conveying the distributing system within the lumber company's yards, because the Gold Bar Light and Water Company, after it acquired title, refused to repair pipe lines leading from the main line within the

yards of the lumber company. This was a practical construction by the parties to the original deed, and, we think, under the circumstances of the case, should have controlled the construction of the deed.

The respondent makes the point that there was one exception in the deed, to the effect that the grantor excepted section 36 from the warranty clause; that if there were any other exceptions they would have been stated in the deed. Ordinarily it is true that, where there is an exception of one thing, it will be presumed that other things are not excepted; but here the grantor was conveying the right of way across a school section. That was excepted from the warranty of the right of way. We are of the opinion that this exception did not operate to include things not contained within the description of the property actually sold. We are of the opinion, therefore, that the distributing system within the appellant's yards was not included in a description of the property sold.

The judgment appealed from is therefore reversed and the cause ordered dismissed.

HOLCOMB, C. J., TOLMAN, FULLERTON, and BRIDGES, JJ., concur.

[No. 15535. Department Two. January 12, 1920.]

THE STATE OF WASHINGTON, *Respondent*, v. JOE GIAUDRONE, *Appellant*.[1]

INTOXICATING LIQUORS (30)—UNLAWFUL POSSESSION—STATUTES—CONSTRUCTION. Laws 1917, p. 60, § 17h, amendatory of the prohibition act (Rem. Code, § 6262-1 *et seq.*), providing that it shall be unlawful for any person except clergymen or priests to have possession of any intoxicating liquor other than alcohol, is inconsistent with and impliedly repeals the provisions of the original act making it lawful to give away intoxicating liquors in a private residence to be drunk on the premises.

SAME (6)—UNLAWFUL POSSESSION—STATUTES—CONSTITUTIONALITY. Laws 1917, p. 60, § 17h, making it unlawful for any person except clergymen or priests to have possession of any intoxicating liquor other than alcohol, is not unconstitutional as abridging the privileges or immunities of citizens or as depriving any person of life, liberty or property without due process of law.

Appeal from a judgment of the superior court for Kittitas county, Davidson, J., entered June 6, 1919, upon a trial and conviction of violating the prohibition law. Affirmed.

Pruyn & Hoeffler, for appellant.

Arthur McGuire and *C. R. Hadley*, for respondent.

FULLERTON, J.—The defendant, Giaudrone, was convicted by a jury of a violation of the act relating to the manufacture, keeping, sale and disposition of intoxicating liquors, and appeals from the judgment pronounced against him.

The facts of the case are not in dispute. The defendant, in the fall of the year 1914, manufactured a quantity of grape wine, some forty gallons of which he had in his possession on December 27, 1918. The wine was kept at his private home, for the use of him-

[1] Reported in 186 Pac. 870.

self and his family as a beverage, without intent or purpose to sell or dispose of it in barter or traffic. The wine was an intoxicating liquor other than alcohol, and the defendant was not at the time a regularly ordained clergyman, priest or rabbi actually engaged in ministering to a religious congregation.

At the appropriate time during the course of the trial, the defendant requested the court to instruct the jury that, under the facts shown, it was their duty to find the defendant not guilty. The court declined so to charge, but, on the contrary, charged that it was immaterial for them to inquire when possession of the liquor was first obtained, or the purposes for which it was intended to be used, and if they were convinced by the evidence beyond a reasonable doubt that the defendant had in his possession at the time named in the information, namely, December 27, 1918, the wine described, and that it was an intoxicating liquor other than alcohol, and that the defendant was not then an ordained clergyman, priest or rabbi actually engaged in ministering to a religious congregation, they should find the defendant guilty as charged in the information.

In this court the defendant makes two principal contentions. He contends, first, that the prohibition acts do not make the mere having in possession of intoxicating liquor a crime, when it is kept for the sole use of the possessor as a beverage, without intent or purpose to traffic therein; and second, that if the act is so construed, it is violation of fundamental rights guaranteed the individual by the state and Federal constitutions.

Noticing the first of these contentions, it is not to be denied that the acts in consideration contain language which in its natural and unrestricted meaning makes it an offense for any person, other than a person

of a certain designated class, to have in his possession intoxicating liquor other than alcohol. Section 17h of the act of 1917 (Laws 1917, p. 60), which is amendatory of the original prohibition act known as Initiative Measure No. 3 (Rem. Code, § 6262-1 *et seq.*), expressly declares that:

"It shall be unlawful for any person other than a regularly ordained clergyman, priest or rabbi actually engaged in ministering to a religious congregation, to have in his possession any intoxicating liquor other than alcohol."

But it is contended, if we have correctly gathered the meaning of the appellant's learned counsel, that this particular section is not to be given a literal effect, as to do so would make it inconsistent with other provisions of the act, and inconsistent with the general tenor of the act taken as a whole.

The particular provisions pointed out are the concluding clause of section 4 of the original act (Rem. Code, § 6262-4), which was not repealed by the amendatory act, and which provides that it shall not be unlawful for a person to give away intoxicating liquor, to be drunk on the premises, to a guest in his private dwelling or apartment which is not a place of public resort, and § 23 of the amendatory act, which provides that, in any prosecution for a violation of the act, it shall be competent to prove possession of intoxicating liquor, and that, such proof "shall be *prima facie* evidence that said liquor was so held and kept for the purposes of unlawful sale or distribution," the argument with reference to these provisions being that, if it is lawful to give intoxicating liquor away in any manner, and if possession is only *prima facie* evidence of a violation of the law, it cannot have been meant that mere possession is also a violation of the law.

But as to the first of these sections, it will be noticed that it is a part of the original initiative measure, and that the section cited as containing the prohibition is amendatory of the original measure and a later expression of the legislative will. In so far as there is a conflict between them, the earlier provision is superseded by the later, and in so far as the language of the later section is direct and mandatory and free from ambiguity, it is to be construed without reference to the language of the earlier provisions. That there is a conflict must be conceded. A man cannot lawfully give his neighbor drink of that which he may not himself lawfully possess. But it is also true that the later act is in its language direct and mandatory and without ambiguity. We cannot, therefore, but conclude that the earlier provision was superseded by the later one.

A reading of the act will disclose the purpose of the other provision cited. It had defined a "jointist" as a person who opens up, conducts or maintains, either as principal or agent, any place for the unlawful sale of intoxicating liquor, and a "bootlegger" as any person who carries about with him intoxicating liquor for the purpose of unlawful sale, making these acts punishable as felonies, while other violations are punishable as misdemeanors. Since the provision in consideration relates to unlawful sales, it must be read in connection with those provisions of the act to which it can relate, not as superseding mandatory provisions with which it can have no relation other than by an inference more or less remote. But more than this, the section but prescribes a rule of evidence, and it is not the rule that one section of a statute so limited will in itself be allowed to control or supersede plain mandatory provisions of the same statute, although subsequent in place in the statute and apparently otherwise meaningless.

The argument founded upon the general tenor of the acts, we cannot think tenable. The various provisions of the act are too extended to be inserted here, but a study of its several provisions convinces us that it was the purpose of the legislature to prohibit entirely the use of intoxicating liquors as a beverage; or, as the current phrase expressed it, "make the state bone dry."

The case of *State v. Eden*, 92 Wash. 1, 158 Pac. 967, 159 Pac. 700, is cited as supporting the conclusion that possession of liquor lawfully acquired prior to the passage of the initiatory measure is not a violation of the provisions of the act. But that case was decided prior to the passage of the amendatory act, when it did not forbid a limited use of intoxicating liquors, and when it did not contain the sweeping provision now found in the section before cited designated as section 17h. The decision was based on provisions of the act many of which have been directly repealed. Plainly it was not there asserted, or intended to be asserted, that the state may not make criminal the possession of intoxicating liquor, whensoever or howsoever acquired.

In support of his second contention, the defendant points to no specific provision of the constitution that has been violated. His argument is that the mere possession of intoxicating liquor kept for one's own use is not inherently injurious to the health, morals or safety of the public, and that therefore legislation prohibiting such having in possession is not a legitimate exercise of the police power, but is, on the contrary, void as an unjustified abridgment of inherent rights of the individual. There are cases which support the principle contended for, and it may be that the weight of authority is with that side of the con-

troversy. See *Cortland v. Larson,* 273 Ill. 602, 113 N. E. 51, Ann. Cas. 1916E 775, L. R. A. 1917A 314. But we think the better reason is with the contrary view, and it has in its support the Federal supreme court. In the recent case of *Crane v. Campbell,* 245 U. S. 304, the court had before it a statute of the state of Idaho making it a criminal offense for any one to have in possession intoxicating liquors except for a limited purpose. It was contended that the statute was violative of the Federal constitution which declares: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law." The court in passing upon the contention used this language:

"It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment. *Bartemeyer v. Iowa,* 18 Wall. 129; *Beer Company v. Massachusetts,* 97 U. S. 25, 33; *Mugler v. Kansas,* 123 U. S. 623, 662; *Crowley v. Christensen,* 137 U. S. 86, 91; *Purity Extract Co. v. Lynch,* 226 U. S. 192, 201; *Clark Distilling Co. v. Western Maryland Ry. Co.,* 242 U. S. 311, 320, 321; *Seaboard Air Line Ry. v. North Carolina, ante,* 298.

"As the State has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective. *Booth v. Illinois,* 184 U. S. 425; *Silz v. Hesterberg,* 211 U. S. 31; *Murphy v. California,* 225 U. S. 623; and *Rast v. Van Deman & Lewis Co.,* 240 U. S. 342, 364. And, considering the notorious difficulties always attendant upon efforts to suppress

traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose.

"We further think it clearly follows from our numerous decisions upholding prohibition legislation that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no State may abridge. A contrary view would be incompatible with the undoubted power to prevent manufacture, gift, sale, purchase or transportation of such articles—the only feasible ways of getting them. An assured right of possession would necessarily imply some adequate method to obtain not subject to destruction at the will of the State."

The reasoning of the court is applicable to the contention made under our state constitution, and we adopt it as expressive of our views.

The judgment is affirmed.

HOLCOMB, C. J., MOUNT, BRIDGES, and TOLMAN, JJ., concur.

[No. 15589. Department One. January 12, 1920.]

JOHN COHAGEN, *Respondent*, v. BIG BEND LAND COMPANY, *Appellant*.[1]

CORPORATIONS (195)—ACTIONS—VENUE—"TRANSACTING BUSINESS." Where a corporation was buying and selling land in a county and leasing the same on shares and receiving and disposing of the same and made a contract in that county, it was "transacting business" in such county, within the meaning of Rem. Code, § 206, authorizing suits to be commenced against a corporation in any county where it was transacting business.

BROKERS (13, 33) — COMMISSIONS — PERFORMANCE — SUFFICIENCY. Where a broker to secure a lease was informed by the owner that possession could be given immediately, he had a right to rely thereon, and is entitled to commissions, earned under that understanding, although the deal fell through because possession could not be given immediately.

Appeal from a judgment of the superior court for Grant county, Hill, J., entered April 10, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover a broker's commission. Affirmed.

Merritt, Lantry & Merritt, for appellant.

N. W. Washington, for respondent.

MAIN, J.—This action is based on a written contract for a commission claimed to have been earned in producing a purchaser who was ready, able and willing to buy a certain half-section of land in Grant county upon terms which had been assented to by the defendant. The cause was tried to the court and a jury, and resulted in a verdict in favor of the plaintiff. From this judgment, the defendant appeals.

The respondent resides in Grant county, and the action was instituted in that county. The appellant is a corporation organized under the laws of the state

[1]Reported in 186 Pac. 1070.

of Washington, with its principal place of business in Spokane county. Some time during the year 1915, the respondent purchased a half-section of land in Grant county for which the appellant furnished the consideration. The title, at the time of the purchase, was taken in the name of the respondent. Thereafter and during the same year, the title was transferred to the appellant. At about the time of this transfer, and on the 14th day of December, 1915, a written contract was entered into between the parties by which it was agreed that, in the event that the respondent should secure a purchaser for the land "upon terms satisfactory to" the appellant, he should be entitled to one-half of the profits that might arise upon the transaction. On the 16th day of March, 1916, the appellant leased the land to one R. V. Weaver for a term expiring on the 31st day of December, 1917, unless the lease should be earlier terminated under the provisions thereof. This lease was prepared by the appellant at Spokane and forwarded to the respondent with direction to him to have the proposed tenant execute the same. The lease as written contained a provision that, if the land should be sold prior to the first day of May in any year, the tenant, upon receiving the consideration specified therein, should vacate the premises. Before the lease was signed, the respondent changed the word "May" in the lease, making it read "March." The lease was then executed and returned to the appellant, which apparently approved the change.

Some time during the month of April, 1917, the respondent had a telephone conversation with the president of the appellant company with reference to the sale of certain lands in Grant county, among others, the half-section for the producing a purchaser of which it is claimed the respondent earned the commission

sought to be recovered in this action. The respondent testified that, in this conversation, he told the president of the appellant that he had a proposed purchaser for this tract of land and the terms upon which it could be sold, and inquired specifically as to whether immediate possession could be given. He says that he was assured that such possession could be given. The terms otherwise were satisfactory to the appellant. Thereafter the respondent went to Spokane with the proposed purchaser for the purpose of closing the transaction. At that time the appellant refused to do anything further in the matter, as, under the terms of the lease, possession could not be given. One of the conditions upon which the proposed purchaser was willing to take the land was that of immediate possession. The action is brought on the theory that the sale was made upon terms satisfactory to the appellant and upon the assurance of its president that possession could be immediately delivered. There is no controversy over the fact that the proposed purchaser was ready, able and willing to buy the land upon the terms specified, providing he could have immediate possession. The action was instituted in Grant county and service of process was had upon the appellant in Spokane county. The appellant moved for a change of venue from Grant county to Spokane county, claiming that the respondent had no right to maintain the action in the former county. The statute relative to the venue of actions against private corporations (Rem. Code, § 206) provides:

"An action against a corporation may be brought in any county where the corporation transacts business or transacted business at the time the cause of action arose; or in any county where the corporation has an office for the transaction of business or any person resides upon whom process may be served

against such corporation, unless otherwise provided in this code."

The motion for change of venue was heard upon affidavits. From these it appears that the appellant's principal place of business was Spokane county, that it had no office for the transaction of business in Grant county, and that there did not reside in that county any officer or agent of the corporation. If the venue was properly laid, under the statute quoted, in Grant county, it must be by reason of the fact that the corporation was transacting business in that county. It reasonably appears that the appellant was buying and selling land in that county, leasing land, receiving as rental therefor at times a share of the crop, and disposing of the same, and that the contract upon which the action is based was there drafted, executed and delivered. These facts show that the appellant was transacting business in Grant county, and therefore, under the statute, might be sued therein. *Hayworth v. McDonald,* 67 Wash. 496, 121 Pac. 984; *Strandall v. Alaska Lumber Co.,* 73 Wash. 67, 131 Pac. 211.

Upon the merits, the only question is whether the evidence was sufficient to justify the submission of the cause to the jury. This question has been preserved throughout the record. It may be conceded that the respondent would be charged with knowledge, at the time the lease was executed, of its terms, and if there were no other fact in the record, that there would be no evidence to carry the case to the jury. He testifies, however, that, in the telephone conversation above referred to, he inquired of the president of the appellant whether immediate possession of the land could be given in the event that the sale was accomplished, and received the assurance that it could. The officer of the appellant with whom the conversation occurred

gave a different version of it and denied that he had given the assurance that immediate possession could be given, and further testified that the failure to consummate the sale was only because possession could not be delivered under the lease. If the respondent, as he testified, was assured that immediate possession could be given, he had a right to rely upon this, even though he knew the terms of the lease at the time it was executed. He might well have believed that, during the months that intervened between the execution of the lease and the time of the conversation, the appellant had made or could make some arrangement with the tenant by which immediate possession could then be given. The evidence being in dispute upon the question as to whether the respondent had received assurance in the telephone conversation that immediate possession could be given, and this being a material issue of fact in the case, was for the jury to determine. It cannot be said, as a matter of law, that the facts in the case are without dispute upon any material matter.

The judgment will be affirmed.

HOLCOMB, C. J., MITCHELL, MACKINTOSH, and PARKER, JJ., concur.

[No. 15591. Department One. January 12, 1920.]

M. G. NAYLOR, *Appellant*, v. C. O. LOVELL, *Respondent*.[1]

BILLS AND NOTES (127)—REFORMATION OF INSTRUMENTS (6, 19)—MISTAKE—EVIDENCE—ADMISSIBILITY. In an action upon a mortgage note and to reform and foreclose the mortgage, alleged in the complaint to have fixed the due date by mistake, parol evidence of the mistake is admissible.

EVIDENCE (104)—HEARSAY—ADMISSIBILITY. In an action to reform and foreclose a mortgage, alleged to have fixed the due date by mistake, the positive evidence of the persons present as to what occurred is not inadmissible as hearsay.

BILLS AND NOTES (64, 138)—BONA FIDE PURCHASERS—NOTICE OF MISTAKE—EVIDENCE—SUFFICIENCY. In an assignee's action on a mortgage note and to reform and foreclose the mortgage, findings that by mistake the mortgage fixed the due date one year in advance of the maturity of the note, and that plaintiff had notice of the mistake when he purchased at a large discount, are sustained where the discrepancy appeared on the face of the papers, and he was told of the two dates, and he admitted having had some intimation of it; the presumption of good faith attaching by virtue of Rem. Code, § 3447, being in such case overcome by clear and satisfactory evidence.

Appeal from a judgment of the superior court for Yakima county, Taylor, J., entered May 1, 1919, upon findings in favor of the defendant, in an action to foreclose a mortgage, tried to the court. Affirmed.

Charles F. Bolin and *Snively & Bounds*, for appellant.

Lyons & Orton, for respondent.

MITCHELL, J.—On May 7, 1918, Lewis Pearne Bond sold and conveyed to C. O. Lovell eighty acres of land situated in Yakima county, Washington, in consideration of a cash payment of $6,000 and a note secured by a mortgage on the land in the sum of $10,000. The

[1] Reported in 186 Pac. 855.

note as executed was made payable on or before March 1, 1919, "with interest thereon, in like gold coin, at the rate of three per cent per annum from maturity, for value received, interest to be paid at maturity;" while the mortgage provided: "This conveyance is intended as a mortgage, and is given to secure the payment of $10,000, together with the interest thereon at the rate of three per cent per annum from March 1, 1919, until maturity, and at six per cent per annum after maturity, payable annually according to the terms of one certain promissory note bearing date May 7, 1918, payable on or before March 1, 1920, to the order of Lewis Pearne Bond, etc."

The mortgage was duly filed and recorded in the office of the auditor of Yakima county on May 8, 1918. To accommodate the maker, for the purpose of making the payments, the note and mortgage were left with the Central Bank at Toppenish, Washington. It appears also that the note and mortgage were at one time used by the owner as collateral in a loan to him by the bank. On September 3, 1918, a payment of $2,750, made on the principal of the note and mortgage, was duly indorsed on the note. On January 10, 1919, in consideration of the sum of $6,475—a discount of $775 on the then face value of the note—the plaintiff, M. G. Naylor, purchased the note and mortgage, and on March 17, 1919, commenced this action for judgment on the note and foreclosure of the mortgage.

In the complaint it is alleged the mortgage inadvertently and by mistake fixes the due date March 1, 1920, instead of March 1, 1919, necessitating reformation accordingly, which is prayed for in the foreclosure proceedings. The answer denies there was any mistake as to the date of maturity of the mortgage, and alleges a mistake in the due date expressed in the note; that it was intended by both the maker and the

payee that the note should be due and payable and bear interest as provided in the mortgage; and that plaintiff had, at and prior to his purchase of the note, full notice, both actual and of record, of said mistake. The answer prays for a correction and reformation of the note to conform to the true agreement, and that the action be dismissed, so far as the plaintiff is concerned, as prematurely brought. Upon the trial the court was convinced in favor of the defendant's contentions, and entered findings and judgment accordingly. Plaintiff has appealed.

The assignments of error present only two main questions: First, was there a mistake in writing the note payable on or before March 1, 1919, instead of March 1, 1920, as the mortgage provided? and second, if there was such a mistake, did appellant have notice of it at and prior to the time he purchased the note and mortgage? On the first proposition, the evidence is abundant and undisputed that it was the intention of the parties that the note should fall due and bear interest as expressed in the mortgage, and that by mistake it was written otherwise in the note. It appears appellant does not dispute the convincing force of the proof in this respect, but rather insists that the testimony of the witnesses upon the subject as to what occurred at the time of execution and delivery of the note and mortgage and the way in which the mistake occurred was hearsay and not binding upon the appellant because he was not present at that time, and because it was an attempt by parol testimony to defeat the terms of the written instrument. As to the latter, it is the general rule that, where parties adopt a written instrument as a mode of contracting, it becomes a matter of both principle and policy to prevent any inferior evidence from being used either as a substitute for, or alteration of, the written contract. But it is

equally well settled there is an exception to the rule in cases seeking relief from mistake or fraud. The present case is one wherein relief is sought from an alleged mutual mistake. It is a matter of equitable cognizance, wherein justice would be defeated but for the admission of parol evidence. It is difficult to understand how it can be well claimed the evidence complained of was hearsay. It was the positive evidence of persons present and taking part in the transaction out of which, and at the time, the mistake occurred; while as to its not being binding upon appellant because he was not present, the contention is correct if he was unaware of the mistake in the note at the time he purchased it and the mortgage, otherwise not so.

On the second proposition, the evidence is against the appellant. The mortgage was on record and was purchased by appellant with the note. Upon their faces they showed a discrepancy as to the due date and interest. In negotiating the sale of the note and mortgage, the owner was represented by his father, Fred A. Bond, who testified that, in all his talks with appellant and his agent leading up to the sale, he figured with them attempting to make the sale at eight per cent discount; and yet, upon appellant's theory, a note of the face value of $7,250, secured by a mortgage on a $16,000 farm, was purchased by him at a discount of $775, less than fifty days before the maturity of the paper.

Fred A. Bond testified he had not seen the note at the time of the sale to appellant, but had examined the mortgage at the bank and told the appellant, in his negotiations with him, that the debt for which the note and mortgage were given was due March 1, 1920. A few days after the purchase by appellant, in a conversation with H. B. Miller, cashier of the bank at

Toppenish, appellant asked him if he knew the note and mortgage had different dates for maturity. On being advised in the negative (it seems the bank had not noticed the discrepancy, but, in taking the note and mortgage as collateral, had depended on the due date expressed in the mortgage), appellant told him there were two dates mentioned in the papers. Mr. Miller said, being surprised, he had appellant repeat the information, and then, according to his testimony:

"I put a rather pointed question to Mr. Naylor at that time, and I said to Mr. Naylor, 'Did you know when you bought these papers that that was the case,' and he rather hesitated and he said, 'I had some indication of it.' "

By a letter dated January 19, 1919, appellant notified respondent he had purchased the note and mortgage and that the note would become due March 1, 1919. Within a week they met (until that time they had no personal acquaintance with each other) and had a conversation in which, as testified to by respondent:

"He told me he had purchased this note and mortgage and that the note was due March 1, 1919; I said, 'I didn't understand it that way, did you,' and he said, 'Not until I saw the note, and I let you know as soon as I knew myself.' "

Appellant denies all these statements, but we are satisfied the proof is against him.

By Rem. Code, § 3447, to constitute notice of an infirmity in a negotiable instrument, the person to whom it is negotiated must have had actual knowledge of the infirmity, or knowledge of such facts that his action in taking the instrument amounted to bad faith. That is, as stated by the writers: "The rights of the holder are to be determined by the simple test of honesty and

good faith." The presumption of good faith attaches in favor of a holder who takes the instrument for value prior to its maturity, but the presumption is rebuttable. And in the present case we are convinced, as was the trial court, by what to us appears to be clear and satisfactory evidence, that the presumption in favor of appellant has been overcome; and that, at and prior to his purchase of the note and mortgage, he had such knowledge of the defect in the note as to its due date, and knowledge of such facts and circumstances relating thereto, that his conduct in taking the note with the intention of claiming it to be due as expressed on its face, and attempting to enforce payment prior to the date of maturity intended by the original parties to the note, amounted to bad faith. 8 C. J., page 496, §§ 706, 707.

The judgment denying appellant relief and correcting and reforming the note as prayed for in respondent's answer was correct, and it is affirmed.

HOLCOMB, C. J., PARKER, MACKINTOSH, and MAIN, JJ., concur.

[No. 15402. Department Two. January 13, 1920.]

J. SAARI, *Respondent,* v. WELLS FARGO EXPRESS COMPANY, *Appellant.*[1]

MUNICIPAL CORPORATIONS (379, 380, 389)—USE OF STREETS—CROSSING AND PASSING—NEGLIGENCE—EVIDENCE—SUFFICIENCY. That defendant, driving a truck which was run into by plaintiff's motorcycle at a street intersection, had the right of way and was exercising due care, is established where there was evidence that he entered the street intersection first and made a lawful turn when he was hit from behind and the ordinance gave vehicles to the right the right of way and required plaintiff to look out for the truck, and there was little evidence that defendant was driving other than in a careful manner.

APPEAL (417)—REVIEW—FINDINGS—PREPONDERANCE OF EVIDENCE. While the findings of the trial court upon conflicting evidence are ordinarily adopted, they will be reversed on appeal if not supported by the preponderance of the evidence.

Appeal from a judgment of the superior court for King county, Smith, J., entered February 1, 1919, upon findings in favor of the plaintiff, in an action for personal injuries sustained in a collision with a motor truck, tried to the court. Reversed.

James B. Murphy and *Arthur H. Hutchinson,* for appellant.

O. L. Willett and *John A. Soule,* for respondent.

HOLCOMB, C. J. — Respondent had judgment, after trial to the court without a jury, upon findings of fact and conclusions of law in his favor for damages for personal injuries. The negligence of the defendant's employees and the contributory negligence of plaintiff were in issue. Plaintiff suffered very serious injuries and his property was damaged, and the amount awarded by the court, if defendant was at fault and plaintiff

[1] Reported in 186 Pac. 898.

not, was very just and well founded, notwithstanding appellant's contentions respecting same.

The automobile accident which gives rise to this action occurred at the intersection of Tenth avenue north and East Aloha street, in the city of Seattle, at about ten forty-five o'clock a. m. of October 24, 1917. Tenth avenue north runs in a northerly and southerly direction and is intersected at right angles by East Aloha street. Tenth avenue north has laid upon it double street car tracks and is somewhat wider than East Aloha street. Both streets are paved and, at the time of the accident, the pavement was dry. Between the street car tracks and for eight inches on each side thereof, Tenth avenue north was paved with brick. On each side of East Aloha street and on the west side of Tenth avenue north the level of the lots is from five to ten feet above the street level, so that one approaching on either street does not have a clear vision of the other street until near the street intersection.

The one and a half ton truck of defendant, with a covered body of the type usually employed by it, approached the intersection from the west on East Aloha street. A motorcycle driven by the plaintiff, with a companion on the rear seat, approached the intersection from the north on Tenth avenue north. When about twenty feet from the street intersection, plaintiff saw the top of the approaching truck on East Aloha street over the lot level, and immediately he shut off his power and applied his brakes. He had been traveling about five feet from the west curb, and immediately changed his direction so that he arrived in the intersection between the two westerly street car rails a few feet south of the center of the intersection. The truck was traveling a little to the south of the center of East Aloha street and, intending to turn into Tenth avenue north and travel south on that

street, the helper, sitting to the right of the driver of the truck, signalled with his hand extended on the right side of the truck, and the driver swung the truck towards the south. In order to make the turn, he had to approach the center of Tenth avenue north, and the evidence shows he traveled with his left rear wheel about a foot to the east of the extreme westerly street car rail, a distance of about thirteen and one-half feet from the westerly street curb. Plaintiff and his witnesses maintain that, while in the act of turning and while in the street intersection, the left rear wheel of the truck swung and struck the middle of his motorcycle. Defendant's witnesses are equally positive that the motorcycle and the left rear wheel of the truck came into collision a few feet south of the intersection after the truck had straightened out towards the south. While plaintiff and his witness testified that the truck was traveling at a high rate of speed, in view of the fact that the truck had turned into East Aloha street one block west of Tenth avenue north, and that the driver was intending to turn into Tenth avenue north, it hardly seems probable that the truck had attained any great speed. While it seems to be plaintiff's theory that the rear of defendant's truck skidded as it swung around the corner, there is no evidence upon which to base such a fact, neither the plaintiff nor his witness so testifying. The evidence is undisputed that the front wheel of the motorcycle was buckled and bent backward towards the frame, apparently indicating a collision at great momentum with something in front, or an impact from a heavy object from the front.

Defendant alleged the violation of the state law and of certain city ordinances, and pleaded in the second

paragraph of his affirmative defense certain sections of ordinance No. 37,434 of the city of Seattle, which are not traversed by the plaintiff and must, therefore, be taken as established. We quote two sections of this ordinance:

"Section 49. Drivers shall look out for and give right of way to vehicles simultaneously approaching the street intersections from their right.

"Section 51. The driver of any vehicle turning to the right from one street into another shall have right of way over vehicles traveling in the direction in which such vehicle is turning and the driver of any vehicle traveling in the direction in which such vehicle is turning shall allow such right of way to such vehicle so turning."

Appellant assigns numerous errors, but it is unnecessary to discuss all of them. Under the paragraphs of the ordinance just quoted, and the evidence shown by the record, it is plain that defendant's truck had the right of way at this street intersection. Indeed, in his amended complaint, in paragraph 3 thereof, the plaintiff seems to admit this in his allegation, "said plaintiff having stopped on the center of the intersection of said streets for the purpose of giving the approaching truck the right of way." From all the facts shown by the record, there is little upon which to base the contention that defendant's truck was being driven in other than a careful, prudent manner and in no way violative of the city ordinance relating to speed. In turning, the truck, which was nineteen feet long, projected into Tenth avenue north about thirteen and one-half feet from the west curb. The body of the truck was about eight feet wide. The record fails to show that this movement of the truck was other than a compliance with the city ordinance, which says:

"Section 21. — A vehicle, except when passing a vehicle ahead, shall keep as near the right hand curb as practicable, so as to leave the center of the street free and open for overtaking traffic.

"Section 29.—A vehicle turning into another street to the right hand shall turn the corner as near the right hand curb as practicable." Ordinance No. 37,434.

Plaintiff testified positively that his motorcycle entered the street intersection before the defendant's truck. His only other witness of the accident testified that the two vehicles entered the street intersection at about the same time. All of defendant's witnesses (four in number) testified that the truck entered the street intersection before the motorcycle. Appellant insists that the weight of the evidence clearly preponderates against the finding of the trial court in this regard, while respondent asserts the contrary. In view of these facts, the case of *Yuill v. Berryman,* 94 Wash. 458, 162 Pac. 513, relied upon by respondent, is of little comfort to him. There, upon reviewing the evidence *de novo,* after a trial by the court without a jury, we sustained the findings of the trial court that the appellant, respondent having entered the street intersection first and having the right of way, was negligent in not slackening his own speed and in not looking more carefully so as to avoid a collision, and respondent was not negligent.

Although we ordinarily adopt the findings of the trial judge upon conflicting facts, we are not compelled to do so if we conclude they are not supported by a preponderance of the evidence. *Daugherty v. Metropolitan Motor Car Co.,* 85 Wash. 105, 147 Pac. 655. And while the trial court, although undoubtedly warranted, in weighing the testimony of the witnesses, to consider their demeanor and manner of testifying, may reject any or all testimony of the witnesses for either

party when they conflict, and find the facts contrary to the greater number of witnesses, if justified, yet, when it affirmatively appears that certain purported evidence is given greater weight than should be given, and such enters largely into the decision upon the facts, we will not be bound by the findings unless they manifestly appear correct.

The trial court analyzed and weighed the evidence of the principal witnesses, in part, as follows:

"There are three factors of testimony to be considered; one is the testimony of the plaintiff Saari and his companion. Against them is the testimony of Benjamin and Harris, who were in the other colliding vehicle. The third is the testimony of Mrs. Williams and her daughter. Then, outside of all that, are the actions of natural forces—physical forces.

"Saari and his witness state, in effect, that they were coming at a reasonable rate of speed—ten or twelve miles an hour—down Tenth avenue north. . . . They say they were thirty feet or more from the intersection of the pavement when they got a view down Aloha street; and somewhere towards the middle of the block they saw the truck coming towards Tenth avenue north at a high rate of speed; and that they were in the intersection prior to the entrance of the intersection by defendant."

This disregards the testimony of Saari's witness that both vehicles reached the intersection about the same time. The court continues as follows:

"Benjamin (driver of the truck) and his friend say that he rounded the corner and was facing south when he heard or felt a bump in the car, and he immediately stopped his car. In his deposition he repeatedly refers to a bump or collision in the rear, leading one to think that something must have struck the back of the truck; but he later states that the blow was on his left hind wheel. . . .

"Is it possible to believe that Benjamin was accurate when he says that he was struck in the rear and the effect of the blow was seen upon the left hind hub, when he had reached the position of being parallel with the curb and the motorcycle back of him was parallel with the car tracks and curb?"

The court, of course, could reject Benjamin's testimony as improbable, or for any other reason that was sufficient, but he disregards the testimony of Saari that he had reached the center of the street intersection and his motorcycle had almost stopped in order to give the truck the right of way, and that he stopped about in the center of the street. His testimony itself shows that the place where he says he stopped, or almost stopped, and with his left foot touching the ground, was to the south of the center of the street intersection; and that, if he stopped right in the center of the street in order to let the truck pass, it must have been because of the truck coming from the right and reaching the street intersection at least as soon as he did, and had, as he thought, the right of way through the intersection, whichever way it wished to go. If he stopped exactly in the street intersection when, as he said, the truck was coming rapidly from the west in almost the center of the street, it might be that he was careless and negligent in stopping there in the way of the oncoming truck, unless it was apparently impossible for him to act otherwise to avoid it, for it might have been the purpose of the truck to cross the street instead of turning; and if he had reached the place a little south of the center of the street intersection, he certainly was negligent, unless apparently impossible for him to do otherwise for his safety, in stopping, or almost stopping, at that place, when and where the oncoming truck could not make the turn, if it desired, in the space left for it in the

street without probably in some way striking his motorcycle, which he says it did by the swing of the rear end hitting his motorcycle about the middle.

The court, further analyzing the testimony of Benjamin by deposition, mentions it as having been given:

"at a considerably later time than the time of the accident, after well considered, thoughtful deliberation, knowing that his testimony was going to be put into the record, and that on his testimony would depend, to some considerable extent, the determination of the case; but right after the accident, when still fresh in his mind, he goes down to the police court and says that he was hit when the car was going around the curb, around the corner. Now, there is not cross-examination of the stenographer or clerk down there at the headquarters who took that down; but there have been many cases of this nature. I have found by observation that the stenographer would take down testimony like that absolutely as given. They are all strangers to him. . . . He (Benjamin) says to the police that the collision occurred as he was swinging around the corner."

The above allusion to a police report referred to a written, unsigned memorandum, introduced by plaintiff without any authentication by the person who received it, or the witness, or any other, purporting to be a police report dated October 24, 1917, at 12:35 p. m., report of A. F. Benjamin, Livingston Hotel, a part of which was as follows:

"I was going east on East Aloha and *was turning* to go south on Tenth Avenue North at eight miles per hour, and the motorcycle with two men on it was going south on Tenth Avenue North between twenty-three and twenty-five miles per hour, and the motorcycle ran into my machine."

Even had this memorandum of the report to the police department been competent in the way it was introduced, it was not inconsistent with the testimony

of Benjamin by deposition. In that brief, unsworn report he is purported to have stated to the police department that "he was turning to go south on Tenth avenue north at eight miles per hour." It is well established by the evidence that the motorcycle, at the time of the collision, was on the left of the truck, and the truck, according to Saari's own testimony, was almost, if not entirely, straightened out and headed south on Tenth avenue north, and whether it *was turning* or *had turned* is so fine a distinction in such case as to be entirely immaterial so far as the consistency of the evidence is concerned. In cases tried by the court, we ordinarily consider that improper and incompetent evidence is given no prejudicial weight or credence, but here the contrary affirmatively appears. The report of Benjamin to the police department was improperly admitted and was given undue weight and improper analysis by the trial court.

The trial court also rejected the testimony of Mrs. Williams and her daughter, two disinterested witnesses. Mrs. Williams testified to the effect that she was riding in a rent car, sitting in the back seat between another lady and her prospective husband, and that her daughter was riding in a jump seat on the left side of the car, and the driver in the front seat; that the car was going north on Tenth avenue north and that she was observing the traffic carefully, because her prospective husband was very nervous about accidents from automobile traffic, and that there was very little traffic on the street, which she remarked, and that she saw the motorcycle coming down the west side of Tenth avenue north from the north very rapidly, about one block from Aloha street. She says that, when she was about one-half a block south of Aloha, she looked across some vacant ground to the west of Tenth avenue north and saw the truck coming

towards Tenth avenue north on Aloha, that she wondered whether they would reach Aloha first or whether the truck would; that the truck reached Aloha first and turned south into Tenth avenue north; that the motorcycle, on reaching the intersection, looked as though it was going between the curb and the truck, but it then swerved to the left and ran upon the street car tracks, and the front wheel slipped upon the street car rail and struck the truck on the left near the center. Her daughter testified that she did not see the motorcycle first, but that she saw the truck coming upon Aloha street towards Tenth avenue and turn into Tenth avenue, and then saw the motorcycle enter the street intersection, veer to the left, run upon the street car track, and then strike the truck. Both of them testified that the truck had gotten straightened out to the south and was about twenty-five feet, as they estimated the distance, from the street intersection when the motorcycle struck it, and that their car had reached a point exactly opposite that point, and that their car and the truck ran on but a very few feet before they had both stopped. The daughter was about fourteen years of age.

The court rejected the entire testimony of Mrs. Williams because she was on her way to her wedding (her second) with the gentleman whom she was to wed, approaching the house of the minister, and it was not thought she would observe so accurately as she testified concerning the motorcycle and truck; that she would have been absorbed with the attention of the gentleman at her side; that he was not produced, etc. Yet the witness testified that she was concerned about the traffic because of the nervousness of her prospective husband, and was therefore observing traffic on the street and was concerned with whether the truck would cross Tenth avenue north on Aloha ahead of

them or not, and that the first vehicle she saw in the vicinity of the Aloha street intersection was the motorcycle about a block away coming at a high rate of speed, and that the second was the truck, coming towards Tenth avenue, and that she saw the truck enter Tenth avenue and turn south. The testimony of the daughter was rejected because she could not locate upon the diagram on paper the positions of the various vehicles intelligibly. There is nothing unusual in that. A great many people who have not had experience with maps and diagrams cannot, as the saying is, "Make heads or tails of them." They can allocate themselves with other objects upon the ground, but not upon paper.

The trial judge also experimented with what he called his "small" passenger car, in turning corners at a lawful rate of speed and in ascertaining how closely he could keep his car to the curb while so turning, and considered the result of such experimenting in arriving at his conclusions. In the first place, such evidence was no part of the trial, and its consideration was improper. In the second place, there is a considerable difference between a little passenger car and a large truck, with very long, heavy and rather inflexible frame and wide body, in their respective adaptabilities in turning corners shortly and close to the curb while moving even at the lawful speed.

All things being considered, we are of the opinion that the court did not correctly weigh the evidence and the inferences from the evidence at the trial, and that the preponderance thereof is greatly on the side of appellant.

The judgment is therefore reversed and the cause dismissed.

MOUNT, MITCHELL, FULLERTON, and BRIDGES, JJ., concur.

[No. 15459. Department Two. January 13, 1920.]

B. A. Crowl, *Respondent*, v. West Coast Steel Company *et al.*, *Appellants*.[1]

Appeal (406)—Review—Discretion—Granting New Trial. The granting of a new trial solely on the ground of error of law committed by the trial court is not a matter of discretion, and will be reviewed on appeal.

Same (406). It cannot be said that the court granted a new trial on discretionary grounds, as might be inferred from the order alone, where it appears that the court in a memorandum decision stated that it was granted for error in an instruction.

Trial (45-1)—Argument of Counsel—Special Interrogatories. Where special interrogatories are submitted under Rem. Code, § 341, counsel have a right to argue them to the jury.

Appeal (108)—Preservation of Grounds—Necessity. Error cannot be claimed in the submission of special interrogatories without any opportunity to argue them to the jury, where the record fails to show any request for such permission.

Appeal (445) — Review — Harmless Error — Restricting Argument. Error in depriving counsel of an opportunity to argue special interrogatories submitted to the jury is not prejudicial where the answer to them did not add to or subtract from the general verdict rendered.

Municipal Corporations (392)—Crossings—Contributory Negligence—Instructions. In an action for personal injuries sustained by a pedestrian struck by an automobile, in the absence of statute it would be error to instruct that at other places than at crossings pedestrians must keep a continuous lookout for danger, since the question of negligence is ordinarily one for the jury; but under an ordinance providing that a pedestrian shall cross streets only at crossings and shall there have the right of way over vehicles, which must travel at reduced speed, such an instruction is not error that would entitle plaintiff to a new trial.

Same (380, 391)—Use of Streets—Violation of Ordinance—Contributory Negligence. A pedestrian crossing a street at a place other than a street intersection in direct violation of a city ordinance, is guilty of contributory negligence as a matter of law, although it would still be for the jury to determine whether the negli-

[1] Reported in 186 Pac. 866.

gence contributed to the injury or whether he should have been seen in time to avoid the injury; and it would be his duty to keep a constant lookout.

Appeal from an order of the superior court for Pierce county, Card, J., entered March 10, 1919, granting a new trial, after the verdict of a jury rendered in favor of the defendants, in an action in tort. Reversed.

James B. Murphy and *Arthur H. Hutchinson,* for appellants.

Burkey, O'Brien & Burkey, for respondent.

BRIDGES, J.—This was a suit for personal injuries. The complaint, in substance, alleged that, near the intersection of 21st and Junette streets, in Tacoma, Washington, the defendants negligently caused their automobile to run against and over the plaintiff, thereby injuring him. This location is in the residence portion of the city. The defendants denied negligence and set up contributory negligence as a cause of the injury. There was a verdict against the plaintiff and in favor of the defendants. The plaintiff asked for a new trial based upon the various statutory grounds. The court later made an order granting such new trial. The appeal is from that order.

We are met at the outset with the contention of respondent that the granting of a new trial is within the discretion of the trial court, and that this court will not interfere with the exercise of such discretion except for manifest abuse thereof. That such is the general rule in this state cannot be denied. *Nordeen Iron Works v. Rucker,* 83 Wash. 126, 145 Pac. 219; *Snider v. Washington Water Power Co.,* 66 Wash. 598, 120 Pac. 88; *Gardner v. Lovegren,* 27 Wash. 356, 67 Pac. 615; *Dunkle v. Spokane Falls & N. R. Co.,* 20

Wash. 254, 55 Pac. 51. However, the doctrine that the granting of a new trial is in the discretion of the trial court can be applied only to those instances where the trial court has so acted on grounds involving questions of discretion as distinguished from grounds involving questions of law. For illustration, the court would exercise its discretion by granting a new trial because he believed the evidence was insufficient to justify the verdict, or that there had been misconduct on the part of the jury or some of the parties to the suit. But where a new trial is granted because the court is of the opinion that he has erred in some matter of law, such, for illustration, as the giving or the refusing to give certain instructions, there would not be an exercise of discretion. In the case of *Dunkle v. Spokane Falls & N. R. Co., supra,* the trial court granted a new trial for the reason that he was of the opinion that he had erred in denying the plaintiff's motion to dismiss the action. This court said:

"Respondent invokes the familiar rule that a motion for a new trial is a matter addressed to the discretion of the lower court and that the order of the court will not be disturbed unless the record discloses an abuse of discretion. But it will be observed in this case that the order was based upon the sole ground that the court committed error in denying plaintiff's application to dismiss the action. This raises a clean cut legal proposition, not involving in its determination the exercise of any discretion, and there is nothing in the general rule which will prevent this court from reviewing the order."

In the case of *Gardner v. Lovegren, supra,* this court said:

"It is true that the granting of a motion for a new trial is, in a certain sense, discretionary with the trial court; and, if it were upon matters of fact, the appellate court would hesitate to set aside an order made by

the trial court, unless it plainly appeared that the discretion was abused. But in the case at bar it is a pure question of law, and this court will act upon it independently and uncontrolled by the judgment of the lower court, as it would upon any other question of law which was brought to it upon appeal."

But the respondent insists that, inasmuch as the order granting the new trial was a general one and did not designate the grounds upon which it was made, this court cannot tell whether the trial court acted in the exercise of its discretion or because of some supposed erroneous ruling involving purely legal propositions. We are convinced, however, that the record shows the grounds upon which the court made its order for a new trial. The court was considering four propositions, as follows: (1) alleged misconduct of one or more of the jurors; (2) alleged misconduct of defendants' attorneys in addressing the jury; (3) submitting to the jury certain special interrogatories without having given permission to plaintiff's attorneys to argue thereupon; and (4) the giving by the court of its instruction No. 17. The record makes it plain that the trial court did not grant the motion for a new trial on either of the first two grounds. The court said: "I think there was misconduct of the jury, but not very serious. . . . I cannot bind the supreme court on what they will review. I do not think there was any misconduct of counsel, but I do not know what the supreme court might think." Later the court made and filed in the cause a memorandum decision wherein it is stated that a new trial "is granted in this action for error in instruction No. 17, presented by the defendants; also for misconduct of jury and error in the submitting of interrogatories. The last *grounds* standing alone would not require a new trial, but the error in instruc-

tions makes a new trial mandatory." It is, therefore, plain that the court did not grant a new trial on the ground of misconduct of counsel or misconduct of the jury, but chiefly because of instruction No. 17, and probably to some extent because of the manner in which special interrogatories were submitted to the jury. These involve purely legal questions which this court will review. We may say, however, in passing, that we have carefully examined the record with reference to charges of misconduct of counsel and jury and we are convinced that the record fails to show anything with reference thereto which would justify the granting of a new trial. This then leaves us to determine whether or not the manner of submitting special interrogatories to the jury or the giving of instruction No. 17 constituted such error as would justify the granting of a new trial.

The record shows that, at the close of the testimony, and before the court gave its instructions, and before the argument to the jury, defendants' attorney, in open court, called the court's attention to certain special interrogatories which he desired to have submitted to the jury. They were then handed to the clerk and were by him filed in the cause. When the court instructed the jury, he did not make any mention of the special interrogatories. After the argument to the jury and immediately before it retired to deliberate on its verdict, the court informed it that he would send out to it four special interrogatories to be answered by it. This, it seems, was the first plaintiff's attorneys had heard of any special interrogatories. They then, in the presence of the jury, objected to the interrogatories or special findings because they were not submitted to the jury in time for, or prior to, argument. Nothing further seems to have been done or said in regard to these interrogatories, except they

were sent to, and answered by, the jury. Respondent now contends that he had a right to argue these special interrogatories to the jury and thereby assist them in making correct answers, and that it was error to deprive him of that right. Section 341, Rem. Code, provides:

"Any party may, when the evidence is closed, submit in distinct and concise propositions the conclusions of fact which he claims to be established, or the conclusions of law which he desires to be adjudged, or both. They may be written, and handed to the court, or, at the option of the court, oral, and entered in the judge's minutes."

It would appear that attorneys for defendants did everything the statute required of them. We have no doubt that plaintiff's attorney had the right to argue these interrogatories to the jury, and if the court had refused such permission, it would probably have been error. *Snider v. Washington Water Power Co.*, 66 Wash. 598, 120 Pac. 88; *Pittsburgh, C., C. & St. L. R. Co. v. Lightheiser*, 168 Ind. 438, 78 N. E. 1033; *Laffery v. United States Gypsum Co.*, 92 Kan. 475, 141 Pac. 241; *Stacy v. Cook*, 62 Kan. 50, 61 Pac. 399. However, the record fails to disclose any request by the plaintiff to be permitted to argue the interrogatories to the jury. Evidently the failure of the court to instruct the jury with reference to the interrogatories at the time of giving the general instructions was merely an inadvertence. We have no doubt that the court would have granted such a request had it been made even after the general argument, but the failure to make it, we think, deprives the plaintiff of the privilege of now claiming error on that account.

But there is another reason why there was no prejudicial error in this regard. The jury found a general verdict for the defendants, and the answers to the

interrogatories are not inconsistent with, but, on the contrary, conform to such verdict. The answers to special interrogatories did not add to or subtract from the general verdict. The parties are right where they would have been had there been no special verdict. It is, therefore, perfectly plain to us that the error of the court, if any, in depriving plaintiff's counsel of the opportunity of arguing the special interrogatories to the jury, is without prejudice and would not justify the granting of a new trial.

The giving of instruction No. 17 presents an interesting question. It is as follows:

"You are further instructed that at other places than at crossings the law places upon the pedestrian the necessity of continuous observation and avoidance of injury."

The trial court concluded that this instruction did not state the law, and, chiefly for that reason, granted a new trial. Respondents contend that this instruction invaded the province of the jury. Under ordinary circumstances, and in the absence of statute or local ordinance influencing or controlling the situation, we would be disposed to agree with this contention. This court has uniformly held that the care required of a plaintiff is measured by the care which would be taken, under like circumstances and conditions, by a reasonably prudent and careful man. Ordinarily, it should be left to the jury to say whether or not, under the particular conditions existing, a plaintiff would be guilty of negligence if he did not constantly keep on the lookout for danger. The cases generally are to this effect. *Graham v. Hagmann,* 270 Ill. 252, 110 N. E. 337; *Rump v. Woods,* 50 Ind. App. 347, 98 N. E. 369; *Beeman v. Puget Sound Traction, L. & P. Co.,* 79 Wash. 137, 139 Pac. 1087; *Helliesen v. Seattle Electric Co.,* 56 Wash. 278, 105 Pac. 458; *Minor v. Stevens,*

65 Wash. 423, 118 Pac. 313, 42 L. R. A. (N. S.) 1178, 2 N. C. C. A. 309; *Harder v. Matthews,* 67 Wash. 487, 121 Pac. 983; *Aiken v. Metcalf,* 90 Vt. 196, 97 Atl. 669; *Partlow v. Illinois Cent. R.,* 150 Ill. 321, 37 N. E. 663; *Gerhard v. Ford Motor Co.,* 155 Mich. 618, 119 N. W. 904, 20 L. R. A. (N. S.) 232; *Hennessey v. Taylor,* 189 Mass. 583, 76 N. E. 224, 3 L. R. A. (N. S.) 345; *Knapp v. Barrett,* 216 N. Y. 226, 110 N. E. 428.

The appellants, however, point out that the words of instruction No. 17 were taken from the opinion of this court in the case of *Johnson v. Johnson,* 85 Wash. 18, 147 Pac. 649. In that case the court, in discussing the care required under an ordinance which gave the right of way to pedestrians at intersections of streets and the right of way elsewhere to automobiles, said:

"If the conceded right of way means anything at all, it puts the necessity of continuous observation and avoidance of injury upon the driver of the automobile when approaching a crossing, just as the necessity of the case puts the same higher degree of care upon the pedestrian at other places than at crossings."

But the court used that language as applicable to the facts of that case. Circumstances may arise where the court may say, as a matter of law, that it would be the duty of the plaintiff in crossing the street to be constantly on the lookout to avoid danger.

But there is involved in this case an ordinance of the city of Tacoma, reading as follows:

"Pedestrians shall cross streets only at street intersections and places designated as cross walks, and at such points they shall have the right of way over all vehicles. Between street intersections and crossings vehicles shall have the right of way." Ordinance No. 6626, § 23.

This ordinance not only gives the right of way to vehicles between intersections of streets, but practi-

cally denies to pedestrians the right to cross any street except at street intersections or places designated as cross-walks. A pedestrian, who crosses the street at a place other than at street intersections or cross-walks, does so in direct violation of the specific provisions of this ordinance. Manifestly, this ordinance was passed with the view of lessening, if possible, the number of injuries occurring in city streets, as the result of pedestrians being run over by automobiles. There are in this state many ordinances and statutes regulating street and highway traffic. They forbid the driving of automobiles faster than at certain fixed rates; they require that the automobile be driven on the right-hand side of the street; they require on each automobile certain head and tail lights; they require that the automobile sound its horn under certain circumstances; and many other like provisions designed for the protection of the traveler, whether by wagon, automobile or on foot. This court has uniformly held that a violation of these ordinances and statutes is negligence *per se*. *Traver v. Spokane St. R. Co.*, 25 Wash. 225, 65 Pac. 284; *Engelker v. Seattle Electric Co.*, 50 Wash. 196, 96 Pac. 1039; *Ballard v. Collins*, 63 Wash. 493, 115 Pac. 1050; *Hillebrant v. Manz*, 71 Wash. 250, 128 Pac. 892; *Anderson v. Kinnear*, 80 Wash. 638, 141 Pac. 1151; *Mickelson v. Fischer*, 81 Wash. 423, 142 Pac. 1160; *Johnson v. Heitman*, 88 Wash. 595, 153 Pac. 331; *Ludwigs v. Dumas*, 72 Wash. 68, 129 Pac. 903.

Under the doctrine of these cases, and others which might be cited, it must be held that if the plaintiff, at the time of his injury, was crossing the street between intersections, he did so in violation of the ordinance we have quoted and was guilty of negligence as a matter of law. It would not, of course, necessarily follow from this that, in a case where the plaintiff admits

violation of the ordinance, he should be nonsuited, because it would still be for the jury to determine certain other features, such as whether his negligence contributed to his injury, or whether the defendant saw or should have seen him in time to have avoided the injury. But if the plaintiff, because of the violation of such an ordinance as we have here, be guilty of negligence *per se,* then certainly it would be his duty to be constantly on the lookout to avoid injury. To say the least of it, the court may say, as a matter of law, that where one is on the street in violation of the express provisions of an ordinance, reasonable care, under the circumstances, requires him to constantly observe. In fact, it may be doubtful whether, under these circumstances, the question of reasonable care on the part of the plaintiff is at all involved. That question, however, is not before us and we do not decide it. But we do hold that the instruction given by the court was as favorable to the plaintiff as he was entitled to have it, and that there was no error in giving it.

It follows from what has been said that the court erred in granting a new trial, and the cause is reversed and remanded with instructions to the lower court to set aside the order granting a new trial, and to enter judgment for defendants upon the verdict of the jury.

HOLCOMB, C. J., TOLMAN, MOUNT, and FULLERTON, JJ., concur.

[No. 15467. Department Two. January 13, 1920.]

STENER O. RUE, *Respondent*, v. OREGON & WASHINGTON RAILROAD COMPANY, *Appellant*.[1]

PUBLIC LANDS (9)—SURVEY—MEANDER LINES. The government's original plat and meander of a stream constituting the boundary between two lots cannot be impeached or contradicted by the testimony of a surveyor who made a visual survey without actual measurements, as a nonexpert.

BOUNDARIES (1)—NATURAL MONUMENTS. Where the government plat and meander of a stream constituting the boundary between two lots was not founded on gross negligence or fraud, and the stream actually touched both lots and was permanent and visible, it was a natural monument and controlling.

QUIETING TITLE (20, 25)—FORM OF REMEDY—TITLE. A suit to quiet title to a lot described by metes and bounds according to lines shown on the plat, involving an issue as to the boundaries, is a possessory action under Rem. Code, § 785, in which the superior title, whether legal or equitable, prevails.

PUBLIC LANDS (9)—SURVEY—MEANDERS. The government "meanders" of a stream between two government lots are not run as boundaries but only to ascertain the acreage of the tracts, and the stream constitutes the real boundary, regardless of the area.

PUBLIC LANDS (9)—BOUNDARIES (13)—MEANDERS—EVIDENCE. The government meander of a stream constituting the boundary between two lots is not shown to be so grossly inaccurate as to amount to a fraud by the nonexpert testimony of a surveyor who, from a visual survey, stated that there was a discrepancy in the acreage called for of about forty acres or half of the tract.

BOUNDARIES (12)—EVIDENCE—ADMISSIBILITY. Upon an issue as to the true boundaries of a tract, tax receipts showing the acreage paid on, are admissible; since the taxing officers accept the acreage shown by the government plat, and owners are not bound for taxing purposes by the acreage of their title deeds.

Appeal from a judgment of the superior court for Clallam county, Ralston, J., entered December 17, 1918, upon findings in favor of the plaintiff, in an action to quiet title, tried to the court. Affirmed.

[1] Reported in 186 Pac. 1074.

Bogle, Merritt & Bogle, for appellant.
Rose & Lewis, for respondent.

HOLCOMB, C. J.—Respondent sued to quiet title to lot 3, section 22, township 28 north, of range 15 west, W. M., describing the lot by metes and bounds according to the lines and water boundary shown on the government plat. Appellant answered that it claimed no interest in any land in section 22 other than as thereinafter affirmatively alleged, and then pleaded that it was the owner of lots 1 and 2 in section 22; not alleging anything as to the boundary of the lots, but setting up its ownership according to the technical description, according to the survey and plat, and deraigning its title from the United States, and praying that its title be quieted in lots 1 and 2 and the accretions thereto. In reply, respondent, as to the affirmative defense alleged in appellant's answer, denied that the description of the property therein embraced any part of the real property described in respondent's complaint. At the trial appellant claimed and attempted to prove that there was error in the survey and plat in the meandering and location of the Dickodochteder or Dickey river; that, by reason of this error, the erroneous meander line was the true western boundary of its lot 2, and claimed that lot 2 in fact extended across and beyond the river (Dickey), so that the river, instead of flowing along the western boundary of lot 2, would flow through the lot and put respondent's lot almost entirely away from the stream. Respondent shows title by mesne conveyances of lot 3 from certain lands patented by the United States to one Erickson, of date November 23, 1891. The patent covered 163.95 acres, according to the official plat thereof, but the only portion involved here is lot 3. The plat of the lands on file and returned to the United States

land office recites the acreage of lot 3 as being 39.50 acres.

Appellant shows title by mesne conveyances of lot 2, section 22, back to a patent dated August 12, 1892, to Sarah C. Pullen. The plat of the land on file and returned to the general land office shows the acreage of lot 2 to be 35 acres. There are no accretions involved in the case.

The situation is that, if the eastern boundary of respondent's lot 3 be fixed easterly of the line shown as the boundary line on the plat, or the meander line of the river as shown on the plat, then respondent's acreage will be increased and appellant's acreage will be decreased proportionately.

While the original government plat shows the meander line of what was then called the Dickodochteder or Dickey river as the boundary line between lots 2 and 3, section 22, it appears that some time since the survey the Quillayute river, into which the Dickey river flows, has changed its course through the western portion of the section, so that, instead of flowing in a curve around lot 9, south of these lots, it now flows almost directly west through lots 5 and 6, immediately south of lots 3 and 2, making the junction with the Dickey river at a point east of the west line of lot 3; that the Dickey river has not changed its course since the original survey, but by reason of the change in the course of the Quillayute river, it has become the boundary line for a portion of the south boundary of lot 3 instead of the Dickey.

The original call of the lines of respondent's lot 3, according to the government survey and plat, would have been as follows:

"Commencing at the northwest corner of said lot 3, section 22, township 28 north, range 15 west W. M.; thence easterly along the north line of said lot 3 to

the west bank of the Dickey river; thence southwesterly (or southerly) along the west bank of the Dickey river to the west line of said lot 3; thence northerly to the place of beginning."

Since the change in the course of the Quillayute river, a resurvey has been made by the United States government which still shows the meander lines of the streams as by the original survey, but respondent, in describing the land to which he desired to quiet title, alleged and described it according to the following calls:

"Commencing at the northwest corner of lot 3, section 22, township 28 north, of range 15 west W. M; thence easterly along the north line of said lot 3 to the west bank of the Dickey river; thence southerly along the west bank of the Dickey river to the Quillayute river; thence westerly along the north bank of the Quillayute river to the west line of said lot 3; thence northerly along the west line of said lot 3 to the place of beginning."

The land in controversy lies between the boundary line as it appears in the plat of the survey and the actual meander line of the Dickey river. If acreage, as shown by the patent of respondent, is to prevail, then the land in controversy belongs to appellant as part of lot 2; while if the natural monument, the Dickey river actual stream line, is to prevail, then the land in controversy is part and parcel of respondent's lot 3. Appellant's contention is that the meander lines, as shown on the government's original plat and resurvey, are not true, but that the Dickey river, instead of flowing southwesterly from the point in the east line of lot 3 and west line of lot 2, some distance south of the north line of the section, in fact, at about the place where the survey line between the two lots would cross the meander line, turns somewhat east of south.

To prove that condition appellant offered the evidence of a civil engineer named Hageman, to the effect that he had examined the territory in question and found that the course of the stream was not as shown on the government plat, but as he describes it on a plat which he produced which shows the stream flows east of south instead of southwesterly into the Quillayute river, and that as a result thereof lot 3, if extended to the actual stream, would contain a little more than 82 acres of land instead of 39.50 acres, and that lot 2 of appellant would be diminished by that much. Appellant, from this, contends that the acreage is so excessive, if the actual stream is fixed as the boundary line of lot 3, that it must be considered that the survey is fraudulent, and that therefore the actual and legal boundary between the lots should be as fixed by the meander lines of the survey.

The trial court rejected the plat made by Hageman and his evidence as to the correct course of the stream and the amount of land which respondent would acquire by having the boundary fixed by the actual stream.

It was shown that Hageman made no instrumental survey of the territory or the stream, but merely a visual survey without any actual measurements and without determining the exact course, sinuosities and location of the stream. He had never even made any land surveys, although he was probably professionally competent to do so. What he did in this matter, however, was merely nonexpert, and we cannot consider that his evidence was competent to prove the facts which it was offered to prove, or sufficient to contradict or impeach the official government survey. *Cragin v. Powell,* 128 U. S. 691, and cases cited; *Johnson v. Hurst,* 10 Idaho 308, 77 Pac. 784.

Appellant relies largely upon the case of *Security Land & Exp. Co. v. Burns,* 193 U. S. 167. That was a case arising in Minnesota and tried by the Minnesota courts and taken thence to the United States supreme court, where the original survey showed the fourth side of a tract of land to run to the margin of a lake, and meandered the margin of the lake. It was indisputably shown that the lake on that side was more than one-half of a mile from where the boundary on that side should have been. It was held in that case that the general rule that in matters of boundaries natural objects or monuments will control courses and distances is not absolute and inexorable, and that, where the result of a government survey is founded upon negligence and gross fraud and there is actually no lake, and adopting the lake as it is located as an actual monument would increase the acreage of the land four fold, the meander line cannot be regarded as a boundary, and the patentee is confined to the lands correctly described within the lines and distances of the plat of survey and of the field notes, and which the patentees actually bought and paid for; that, where the patentee has in fact received and is in possession of all of the land actually described in the lines and distances set forth in the field notes and referred to in the patents, and is seeking more on the theory that his plat and survey carries him to the water, a denial of that right on the ground that the survey was fraudulent, and that the natural boundary did not actually exist anywhere near the spot indicated, is a legal defense which can be set up by a defendant in an action of ejectment, and it is not necessary to seek the aid of equity to obtain a reformation of the patent.

But here it was *not indisputably established* that the plat of the survey was the result of, and founded upon, a gross negligence or fraud, and that there was

actually no river near the spot indicated, and that in adopting the stream as it is actually located would increase the patentee's land to such an extent as to be fraudulent or wholly inequitable. On the contrary, the evidence offered by the witness Hageman was not such evidence as would be heard in any court to impeach the official survey. We have in this case not only the original survey, but a resurvey made in the year 1916. It is also an indisputable fact that the actual course of the Dickey river, whatever may be the variation from the official meander line, enters from lot 2 into lot 3 south of the northerly boundary, and is therefore not remote from the land. The evidence of the witness Hageman as to the surplus acreage of lot 3 and the real variance of the actual course of the stream is nothing but the merest conjecture or guesswork. It certainly cannot be held to so far impeach the official surveys of the government as to show gross excess in the amount of land contained in lot 3.

The case of *Gazzam v. Lessee of Phillips,* 20 How. (61 U. S.) 372, also cited and relied upon by appellant, is not apposite. In that case there was no actual meander line or water boundary, but there was in fact an actual conflict and overlapping in the quantities of two portions of the survey of a tract of land from which the government issued patents to two patentees, which overlapped each other. The court observed:

"The sales in each case were made in conformity with the subdivisions, as marked upon the plat of the surveyor general then on file in the office, and to which all purchasers of the public land had access, and which constituted the guide of the register and receiver in making the sales."

So in this case, the sales in each case were made in conformity with the subdivisions as marked upon the plat of the survey, which were returned to the land office and which the purchasers of both had access to, and which showed that the boundary between the tracts was a stream of water called the Dickodochteder or "Dickey" river. This stream, actually touching both tracts and being permanent, apparent and visible, was a natural boundary and must be so considered, unless it can be said that the original survey was so grossly inaccurate as to amount to fraud upon the government and any of its grantees. Such a condition the appellant in nowise convincingly showed by the offered evidence of Hageman, or any other evidence.

We understand that this is a possessory action for real property under Rem. Code, § 785 *et seq.* Section 793 therein provides that:

"The plaintiff in such action shall set forth in his complaint the nature of his estate, claim, or title to the property, and the defendant may set up a legal or equitable defense to plaintiff's claims; and the superior title whether legal or equitable, shall prevail."

By the United States government system of surveys, a meander line is run when a water course or other body of water is the external boundary of the adjacent land. The line showing the place of the water course or other body of water and its course, sinuosities and distance is called a "meander line." The general rule adopted by both Federal and state courts is that meander lines are not run as boundaries of the fractional tracts thus surveyed, but for the purpose of defining the sinuosities of the banks of the streams and other bodies of water, and as a means of ascertaining the acreage of such body of land subject to

sale and which is to be paid for by the purchaser. It has, therefore, generally been held, both by Federal and state courts, that such meander lines are for the purpose of showing the border lines of the streams, but that the water courses themselves constitute the real boundaries. *Railroad Co. v. Schurmeir,* 7 Wall. (74 U. S.) 272; *Hardin v. Jordan,* 140 U. S. 371, and cases cited; *Washougal & La Camas Transp. Co. v. Dalles, Portland & A. Nav. Co.,* 27 Wash. 490, 68 Pac. 74; *Johnson v. Brown,* 33 Wash. 588, 74 Pac. 677; *Schmitz v. Klee,* 103 Wash. 9, 173 Pac. 1026; *Schlosser v. Cruickshank,* 96 Iowa 414, 65 N. W. 344, and cases cited. In the last case above cited, as here, appellants claimed that, as a patent from the government stated the number of acres of land purporting to be conveyed and which corresponded with the acreage within the meander line, plaintiffs had all the land which their remote grantor got from the government, and the land in dispute did not belong to them. It was held that "the statement of the number of acres in these patents in no way limits the extent of the grant. To so hold would, in effect, be holding that a meandered line was a boundary line, which we have seen is not the case. The riparian holder of the patent takes all the land to the shore of the lake, though he may thereby obtain a larger acreage than his patent calls for."

And there, as here, it was also claimed that the question of whether the meander line conformed to the sinuosities of the lake was one in fact to be determined in each case from the evidence, and if it did not follow the body of water, then the land lying between it and the body of water was not embraced within the grant. It was there held, in effect, that to show that the meander line did not in fact follow the sinuosities of the lake required very strong evidence in order to impeach and overcome the official survey

by the United States, and in that case it was held that the evidence in no way overcame same. And we so hold here. The evidence in no way overcomes the official survey by the United States of the meander lines of the Dickey river, at least, to show that the survey was so grossly inaccurate as to amount to fraud upon the government and any of its patentees. The most that we can say of it is that there was suspicion that the meander lines were not accurate as regards the course of the stream, but that does not suffice.

The owners of lands bordering on bodies of water have often bought with reference to access to the water, which constitutes an important element in the value and desirability of the land.

In *Mitchell v. Smale,* 140 U. S. 406, the title of the riparian owner of a fractional quarter section of land containing only 4.53 acres, as platted and patented, was sustained to 25 acres (about five times the call of his patent) between the meander line and the water line.

In *Sherwin v. Bitzer,* 97 Minn. 252, 106 N. W. 1046, the title of a riparian owner to 143.93 acres between the meander line and the lake in a different section was sustained where his patent called for but 68.6 acres; about the same proportional excess as in the instant case. For similar cases, see: *Kirby v. Potter,* 138 Cal. 686, 72 Pac. 338; *Johnson v. Tomlinson,* 41 Ore. 198, 68 Pac. 406; *Hanson v. Rice,* 88 Minn. 273, 92 N. W. 982; *Stoner v. Rice,* 121 Ind. 51, 22 N. E. 968, 6 L. R. A. 387.

The above discussion disposes of the primary question in controversy. It is claimed by appellant, in addition, that the court erred in refusing to receive in evidence tax receipts showing appellant's payment of taxes upon 35 acres in lot 2, and tax records show-

ing payments of taxes by the owners of the land in lot 3 upon only 39.50 acres. Such evidence was not admissible. The assessing officer doubtless accepted the acreage shown by the government plat. Owners are not bound, for taxing purposes, by the acreage shown in their title deeds, nor are they bound by the acreage upon which the taxes are collected. It may be assessed upon an incorrect acreage for any length of time and, when the correct acreage is determined, may be corrected at any time. It may be evidence amounting to a corroborating circumstance which may have been considered in connection with other evidence, but it is not competent to establish title in either of any given tract or acreage of ground, or to impeach or detract from the title of the other.

Other claims of error as to the rejection of evidence by the court are of like nature and untenable.

Decree affirmed.

BRIDGES, FULLERTON, MOUNT, and TOLMAN, JJ., concur.

[No. 15478. Department One. January 13, 1920.]

D. C. BROWNELL, *as Brownell & Company, Respondent,* v. E. G. HANSON, *Appellant.*[1]

BROKERS (17)—COMMISSIONS—PERFORMANCE OF CONTRACT—WILLINGNESS TO PERFORM. A broker is not entitled to commissions upon a sale where he had knowledge of defects of the owner's title, and the sale failed of consummation by reason of the defect which he could not remedy; since he failed to obtain a purchaser ready and willing to buy.

SAME (3, 18)—EMPLOYMENT—DURATION—NEGOTIATIONS THROUGH OTHER AGENTS. A broker who was given an exclusive agency to sell property for a period of thirty days and thereafter until revoked by written notice, is entitled to commissions upon a sale made through another agent without notice to him.

Appeal from a judgment of the superior court for King county, Frater, J., entered April 10, 1919, upon findings in favor of the plaintiff, in an action to recover a broker's commission, tried to the court. Affirmed.

Wardall & Martin (*Winter S. Martin,* of counsel), for appellant.

H. E. Foster, for respondent.

HOLCOMB, C. J.—Respondent, as successor in business to Templeman & Brownell, sued to recover a brokerage commission.

The complaint alleged the employment, on October 24, 1918, by appellant as sole and exclusive agent to sell an apartment house, the furniture and furnishings and the leasehold interest of the premises known as the Van Siclen Apartments. It was alleged that respondent produced a purchaser ready, able and willing to buy at the agreed price, and that respondent was agreed to have a commission of five per cent of the

[1] Reported in 186 Pac. 873.

sale price of $12,500, or the sum of $625, for which judgment was demanded. Appellant put those allegations in issue by general denial.

Respondent proved, and appellant at the trial admitted, the following written memorandum of agreement:

"Seattle, Wn. 10-24 1918

"For and in consideration of the sum of One Dollar, receipt of which is hereby acknowledged, I hereby appoint Templeman & Brownell of 526-527 Green Building, Seattle, Washington, sole agents for the sale of my apartment house furniture and furnishings and leasehold with leasehold interest, located 1214 8th Ave., Seattle, Wn. and agree to pay them 5% as remuneration for their services if sold for $13,000 or any price that I may accept.

"This contract to continue in force for thirty days and thereafter until sold, unless revoked by a written notice at the expiration of the thirty days.

"Witness: D. C. Brownell. Owner Hanson"

The case made by respondent, however, was not as alleged in the complaint, but was substantially as follows:

What appellant had to sell was the apartment house lease and the furniture and furnishings contained in the apartment house, which consisted of a seven-story building of one hundred and fifty-four rooms, or sixty-three apartments. Respondent procured a purchaser named Cronander, on October 24, 1918, who agreed to pay the sum of $12,500 for the apartment house and leasehold, upon terms, $8,000 cash and the balance in monthly payments, which price and terms were acceptable to appellant. The sale, however, was conditional upon the condition that the lease of appellant, which had nearly two years to run from the date of the agreement, with privilege of renewal, be renewed for two years more at least, at the same rent of $775 per month, and also upon the condition that the buyer,

Cronander, could transfer the lease without paying any bonus in case he should wish to sell. There was a further condition that in case the vendor, appellant, was unable to deliver the property with good title within ten days from the date of the agreement, then the money paid down should be returned to the purchaser by the vendor upon demand, but in case the vendor could deliver the property within the time specified with good title, and the purchaser for any reason should fail to complete his part of the deal, then the money paid down should be retained by the vendor as liquidated damages.

The parties were unable to procure the written consent of the owner of the premises, Hutchinson, to the transfer of the lease or to the extension for two years. There was a condition in the lease, which was offered by appellant and rejected by the court, but which we have before us, against transfer of the lease by appellant without the written consent of the landlord, and there was also a provision that the lessees named therein, Hanson and wife, should have an option to extend the lease for a period of two years after its expiration, namely, after June 30, 1920, at a rental then agreed upon. Upon the failure to obtain the consent of Hutchinson, the landlord, to the transfer of the lease and the extension thereof to respondent's purchaser, the money he had paid down, $500, was returned to him and the sale fell through. Thereafter appellant procured another broker, who, through its active agent, Antill, sold the apartment house furniture and furnishings and the leasehold interest to a corporation in no way connected with either of these parties, for the sum of $10,000, and the written consent of the landlord for the transfer of the lease to it and the extension of its term for two years was pro-

cured. For some reason or other not very clear from the record, Hutchinson would not give his written consent to the transfer nor to the extension of the lease without payment to him of $5,000 of the purchase price under this sale. The balance, $5,000, was agreed to be paid in cash and by note to appellant for his interest in the lease, furniture and furnishings. Appellant executed a bill of sale of the furniture and furnishings and his leasehold interest to the purchaser found by the second broker. Upon these facts the court found that respondent's predecessors had been employed by appellant on October 24, 1918, as exclusive agents to sell the apartment house furniture and furnishings, known as the Van Siclen Apartments, agreeing to pay respondent a commission of five per cent of the selling price; that the property was subsequently sold and conveyed by appellant for $10,000, and that respondent's commission on such sale, under the contract, was five per cent of that selling price, and that no part of the commission has been paid. From these findings the court concluded that respondent was entitled to judgment against appellant for the sum of $500.

Appellant seeks reversal of the judgment upon the ground that, as he contends, the principal is not bound to pay a broker's commission for a service rendered when the principal's title failed and the possibility of failure, together with all the facts and circumstances relating to the condition of the title, was made known to the broker at the time the commission contract was entered into between him and his principal.

In support of this contention, appellant offered to prove that, before the written agreement was entered into between respondent and appellant, the terms and conditions of the lease under which appellant held the Van Siclen Apartments and the necessity of procuring the written consent of the landlord to any transfer

of the lease by him was made known to the broker. This evidence was refused, the court declaring his position to be that the broker did not undertake to furnish a good title and that it was up to the principal to do so, and parol evidence could not be received to contradict or vary the terms of the written contract. Appellant concedes in his brief that

"If respondent had such an exclusive contract, and if, during this period from October 24, 1918, to January 18, 1919, appellant Hanson was personally prohibited from selling the property to a third person, under penalty of paying respondent's commission, then the lower court was right in concluding that appellant was liable for the commission, providing this proposition of law is not overturned by superior and higher considerations of law, namely, that, where the broker knows of all defects in his principal's title and enters into the contract of brokerage, he cannot recover unless he meets the conditions or the conditions are removed, and if the principal fails to remove the conditions and fails to cure the defects in title which existed at the time the brokerage contract was entered into, and the deal falls through without any fault on the part of the principal, the principal is not liable."

This, however, incorrectly reverses the major and minor propositions of law. If the broker knew of the defects in his principal's title and entered into the contract of brokerage he could not recover, of course, unless he met the conditions or the conditions were removed. *Seattle Land Co. v. Day,* 2 Wash. 451, 27 Pac. 74. In other words, he takes the contract to procure a purchaser who is ready, willing and able to buy what the broker's principal has to sell, and if the broker knows that the principal has a title which the purchaser will not accept, then he has not produced a purchaser in accordance with the terms of his agreement. *Merritt v. Lillyblade,* 57 Wash. 159, 106 Pac. 621. On the other hand, here we have a special contract which

gives to a broker the right to negotiate any sale of the property involved for the definite time of thirty days, and thereafter until sold, "unless revoked by a written notice at the expiration of the thirty days."

The general rule as to such a contract is:

"A real estate broker who is given an exclusive agency for the sale of property is entitled to a commission on any sale thereof made by the principal either independently or through the efforts of another broker within the time specified in the contract of employment, although the exclusive agent's efforts did not contribute toward the sale." 19 Cyc. 264.

We would be inclined to hold, in accordance with the minority of the courts, that a contract giving the broker exclusive authority to find a purchaser for property, but not negativing the right of the principal to sell the property himself, is not violated by a sale by the principal, and in the event of such a sale, the agent is not entitled to a commission. *Ingold v. Symonds*, 125 Iowa 82, 99 N. W. 713; *Waterman v. Boltinghouse*, 82 Cal. 659. But here the case is that, before any notice of revocation had been given by the principal to respondent as his broker, appellant made or authorized the employment of another broker to procure the sale, and the sale was procured on the condition which was not met with the purchaser procured by the first broker. While we might not hold that appellant was personally prohibited from independently selling the property to a third person, we are certainly obliged to hold that he was prohibited from giving the property to another agent to sell when he had an exclusive agent in respondent.

Appellant also contends that the provision that the agency should continue in force after the thirty days until the property was sold, unless revoked by written notice at the expiration of thirty days, in effect consti-

tutes an agreement in perpetuity. This contention is not meritorious. The agency could easily be revoked at any time, either at or after the fixed period had expired, by written notice, as the contract provided, and there is certainly nothing in the nature of a perpetuity in such contracts.

Judgment affirmed.

MAIN, MACKINTOSH, PARKER, and MITCHELL, JJ., concur.

[No. 15505. Department One. January 13, 1920.]

H. KUBEY, *Respondent*, v. TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA, *Appellant*.[1]

APPEARANCE (8) — GENERAL OR SPECIAL — ANSWER TO MERITS — WAIVER. A special appearance to quash service of a summons is waived where, after the motion was overruled, the party appeared generally by answer without preserving the special appearance.

EVIDENCE (24)—PRESUMPTIONS—MAILING AND DELIVERY OF LETTER. There is a legal presumption that a letter properly addressed and mailed reached the party to whom it was addressed.

INSURANCE (188)—ACCIDENT INSURANCE—NOTICE TO INSURER—EVIDENCE—QUESTION FOR JURY. Whether an insurance company received notice of an accident is a question for the jury, where the evidence of the insured's son that he made out and mailed notice of the claim was corroborated by his sister who was present, notwithstanding he admitted having written to the company only on two occasions, which his letters show to have been at a different time.

APPEAL (142) — PRESERVATION OF GROUNDS — INSTRUCTIONS — REQUESTS AND EXCEPTIONS. Error cannot be assigned on excessiveness in a recovery for weekly indemnity during a continuance of a disability, not exceeding 104 weeks, in an action commenced before expiration of such period, where there was no request for a correct instruction as to the measure of damages, and no exceptions to the instructions given.

Appeal from a judgment of the superior court for King county, French, J., entered March 18, 1919, upon

[1] Reported in 187 Pac. 335.

the verdict of a jury rendered in favor of the plaintiff, in an action on an accident insurance policy. Affirmed.

Grinstead & Laube, for appellant.

Walter B. Allen, for respondent.

MAIN, J.—This action was instituted for the purpose of recovering upon a policy of accident insurance, for alleged permanent disability. The defendant appeared specially and moved to quash the service, which motion being overruled, it subsequently answered. The cause was tried to the court and a jury, and resulted in a verdict for the plaintiff. At the conclusion of the plaintiff's testimony, the defendant challenged the sufficiency thereof and moved for a directed verdict. This was overruled, and the motion was repeated at the conclusion of all the evidence, with a like result. At appropriate times a motion for a judgment notwithstanding the verdict and a motion for a new trial were interposed and overruled. Judgment was entered upon the verdict, from which the defendant appeals.

The preliminary facts may be summarized as follows: The appellant, so far as this case is concerned, may be described as a mutual benefit accident association, incorporated under the laws of the state of Missouri, with its principal office in the city of St. Louis, in that state. When a person became a member of the association, there was issued to him what is designated as a certificate of membership. This certificate provides on its face that any member meeting with an accident must notify the national secretary in writing within thirty days after such accident, giving full particulars of the same and name of the attending physician, and failure to so notify bars recovery, except in cases not material in the present action. This certificate also provides that the constitution and by-laws

promulgated by the association shall be deemed a part of the certificate. The constitution makes provision for the organization, in states other than the state of Missouri, of what is known as "divisions," and sub-organizations under such divisions, designated as "posts." Each post adopts a constitution and by-laws and meets at regular intervals.

The respondent held a certificate of membership in the appellant corporation and was a member of the Washington Division, Post A. On July 8, 1917, while in his place of business in the city of Seattle, he slipped and fell, striking his head upon a box. Soon thereafter the use of his left side became impaired and he had to be assisted to his home. The paralytic condition continued until the time of the trial, and there can be no question but what the affliction was permanent. Other facts will be stated in connection with the particular points to which they may be germane.

It is first claimed that the superior court did not acquire jurisdiction of the cause by proper service of process. Apparently there was an attempt to serve process upon one David Brown, secretary of Washington Division, Post A, but there is no return of such service in the record. There was also an attempt to acquire jurisdiction by the service of process upon the state insurance commissioner, and the record shows a return of such service. Whether service could be had upon the secretary of the local post would depend first upon whether the company was doing business in this state. It had not complied with the insurance code, and no license had been issued to it by the insurance commissioner. Without detailing the facts in full, it may be said that, under the facts in the record, it is probable that the appellant was doing business in this state and that the service upon Brown as its agent would confer jurisdiction, but this question has become

immaterial, as well as the question as to whether the other attempted service was good, since, after the motion to quash the service was overruled, the appellant appeared generally by answer, asked for judgment on the merits, but did not preserve in such answer its special appearance. It therefore waived the special appearance. *Morris v. Healy Lumber Co.*, 33 Wash. 451, 74 Pac. 662; *Hodges v. Price*, 38 Wash. 1, 80 Pac. 202; *Gaffner v. Johnson*, 39 Wash. 437, 81 Pac. 859; *Columbia & Puget Sound R. Co. v. Moss*, 53 Wash. 512, 102 Pac. 439; *In re Martin's Estate*, 82 Wash. 226, 144 Pac. 42. Those cases were cited with approval in *Matson v. Kennecott Mines Co.*, 103 Wash. 499, 175 Pac. 181, but that case differs from the present in this: that there, after the motion to quash had been overruled, the defendant preserved in its answer its special appearance.

It is next claimed that the respondent did not notify the appellant of his accident within thirty days from the time it occurred, as required by the certificate of membership, and that therefore he cannot recover. A young man, who was the son of the respondent, testified that, within a week after the accident happened, he wrote upon the business stationery of the respondent a letter to the national secretary of the association advising the company of the occurrence of the accident, told the name of the attending physician, requested blanks for the making out of a claim, and such other advice as might be needed. He testified that this letter was written in the evening at the home of his parents, where has was residing, and that he mailed it the following morning. In this the witness is corroborated to this extent by a sister, a young woman who testified that she was present when the letter was written, heard it discussed among the members of the family, and also the following morning heard her mother specifi-

cally call her brother's attention to the letter and ask him to be sure and mail it. The young man, during his testimony, in answer to a question, stated that he wrote to the company only on two occasions. The defendant produced two letters written by the son which had been received by the company in due course, one dated January 9, 1918, and the other February 5th following. A witness for the appellant also testified that no other letters had been received. The appellant's position is that production of these two letters, together with its testimony that no other letters had been received, and the testimony of the respondent's witness that he wrote only two letters, is sufficient to take the case from the jury and enable the court to decide, as a matter of law, that the testimony as to the writing of a letter within a week after the accident had been overcome. But we cannot accept this view. As already stated, the son of the respondent testified positively and unequivocally that he had addressed and mailed the letter within a week after the accident. A sister of this witness testified positively as to its being written within a week after the accident, and that the matter was referred to in conversation in the home from time to time. Whatever the court may think as to the weight of the testimony, there was substantial evidence that the letter was written and mailed within a week after the accident, and the question does not become one of law for the court. The legal presumption is that the letter reached the addressee, and it was for the jury to determine from all the evidence whether it was received by the appellant. *Malloy v. Drumheller,* 68 Wash. 106, 122 Pac. 1005.

It is further claimed that the respondent's condition was not produced solely by the accident, and that therefore he cannot recover. The constitution of the appellant company contained a provision that, before re-

covery could be had, the accident must produce the condition for which recovery was sought, "independently of all other causes." Upon the question as to whether the respondent's paralytic condition was produced solely by the accident and was not contributed to by an ailment with which he was then and for some time prior had been afflicted, the evidence is conflicting. There is evidence to support the finding of the jury that the condition was produced by the accident independently of all other causes. The jury's verdict upon this question will be controlling.

Finally, it is contended that the verdict is excessive. For total disability the respondent was entitled to $25 per week during a continuance of such disability, not to exceed one hundred and four weeks. The payment of $25 was to be made in weekly installments. At the time the action was instituted, one hundred and four weeks had not elapsed since the accident. The amount of recovery sought was the sum that would accrue during the entire one hundred and four weeks. The question of the amount of damages is not here subject to review, since the instruction stating the correct measure of damages was not requested, and the record contains no exceptions to the instructions given by the court.

This case differs from the case of *Richardson v. Great Western Motors, ante* p. 324, 187 Pac. 333, in that there the findings and conclusions of the court as to the measure of damages were excepted to, and the cause, being tried to the court, was heard here *de novo*.

The judgment will be affirmed.

HOLCOMB, C. J., MACKINTOSH, and PARKER, JJ., concur.

[No. 15521. Department Two. January 13, 1920.]

JOSEPH SUSSMAN, *as Tacoma Junk Company, Appellant,* v. SAM GUSTAV, *as Pacific Junk Company, Respondent.*[1]

SALES (33)—CONSTRUCTION—TRANSPORTATION—PROCURING CARS. The purchaser of junk to be delivered f. o. b. Seattle is under no obligation to furnish the cars, even if he later offered to assist in obtaining them.

SAME (67)—DELIVERY—DEMAND. Upon a sale of junk f. o. b. Seattle, the seller is bound to load the cars within a reasonable time, without any demand by the buyer.

SAME (36)—TIME OF PAYMENT—TENDER. Upon a sale of junk f. o. b. cars, delivery and payment are simultaneous acts, and the buyer need not tender or pay the price before the cars are loaded.

SAME (151) — ACTIONS (29) — DEFENSES — PREMATURE ACTION. An action for breach of a contract to sell and deliver junk f. o. b. cars, commenced ten days after tender of the price, is not premature, where the seller, after long delays, still refused to fix any time for delivery.

SALES (9, 28)—OPTION. An option to purchase, once accepted, becomes a binding contract.

SALES (151)—ACTIONS—DEFENSES—TENDER. A buyer of junk, having waited a year for delivery, is not obligated to accept a tender after bringing suit for damages.

Appeal from a judgment of the superior court for King county, Smith, J., entered March 19, 1919, upon granting a nonsuit, dismissing an action on contract. Reversed.

Blackburn & Gielens and *Jones, Riddell & Brackett,* for appellant.

Jay C. Allen, for respondent.

BRIDGES, J.—Suit by appellant to recover damages of respondent for breach of a contract to deliver scrap iron. The appellant has his place of business in

[1] Reported in 186 Pac. 882.

Tacoma, and the respondent does business in the city of Seattle. Each was engaged in the scrap iron business. On November 8, 1916, the respondent gave a written option to the appellant as follows:

"Nov. 8, 1916.

"We, the undersigned, hereby grant an option to Mr. Joe Sussman of the Tacoma Junk Co. on 100 tons of scrap wrought iron at $11.50 per net ton, f. o. b. cars, Seattle, said option holds good for two days from date. (Signed) Pacific Junk Co.,
"Per I. Gustav."

Two days thereafter, on November 10, 1916, appellant accepted the option in the following words:

"Nov. 10, 1916.

"Mr. I. Gustav,
"Accept your option one hundred tons scrap iron eleven fifty ton. (Signed) Tacoma Junk Co."

On November 11, the respondent wrote appellant acknowledging receipt of the acceptance of the option and asked that a check for $500 be sent to apply on the purchase price, and thereafter, on November 14, the appellant sent this sum of money to respondent. At the close of the plaintiff's testimony, the motion of defendant for nonsuit was granted, and a judgment dismissing the action entered.

The testimony shows the following: Respondent was to deliver the scrap iron to appellant, f. o. b. cars at Seattle, shortly after January 1, 1917. Several times during January and February, 1917, and at other times during that year, the appellant made demands of respondent for shipment. In each instance the respondent excused himself from delivering by saying that he was unable to get cars for the shipment. At some of these conversations the appellant stated that, if respondent would notify him when he was ready to load, he, the appellant, would come to Seattle and

assist in procuring cars, but respondent never notified appellant that he was ready to load and wanted cars for that purpose. Finally, on October 15, 1917, one Keisler, representing the appellant, went to Seattle and saw the respondent and demanded the delivery of the iron, but the only satisfaction he got from respondent was that he was unable to procure cars. On November 8, 1917, Mr. Gielens, appellant's attorney, went to Seattle to demand delivery and to pay the balance of the purchase price. He made a proper tender of the balance of the purchase price, which tender, however, was refused. At the same time, Mr. Gielens tried to get a promise from respondent as to when he would load the iron, but respondent again complained that he was unable to get cars, and he would not agree to load the cars within a week or ten days or a month; in fact, he refused to fix any time within which he would make delivery. About ten days after this last conversation, this suit was brought.

Respondent contends that he was under no obligation to load until the appellant had furnished him with cars. There was no obligation resting upon appellant to furnish cars. The contract provided that respondent was to deliver the iron f. o. b. cars at Seattle.

This court, in the case of *Menz Lumber Co. v. McNeeley & Co.*, 58 Wash. 223, 108 Pac. 621, 28 L. R. A. (N. S.) 1007, held that, under a contract of this character, it was the duty of the respondent to furnish the cars and load them at his own expense. The terms of the original contract were not altered by the oral agreement of the appellant to assist respondent in procuring cars.

Respondent contends that, inasmuch as the contract did not provide for the time of delivery, he could not be placed in default until the appellant had made demand for delivery. Under the terms of the contract,

[No. 15524. Department One. January 13, 1920.]

CITIZENS BANK, *Respondent*, v. A. B. WILLING, *as Willing & Company, Appellant*.[1]

BILLS AND NOTES (6) — DRAFTS — ACCEPTANCE — STATUTES — CONDITIONAL ACCEPTANCE. Under Rem. Code, § 3524, providing that an acceptance on a paper other than the bill itself does not bind the acceptor except in favor of the person to whom it is shown and who receives it for value on the faith thereof, a draft accompanying a bill of lading for a car load of shooks was not conditionally accepted or binding on the drawee, where the bank consigning the car received the draft several days prior to presentation and on presentation the drawee refused to accept it but requested that the bill of lading and shipment be forwarded to the purchaser for inspection until which no payment would be made; since the bank did not receive the draft for value on the faith of the acceptance, although it may have relied thereon in forwarding the bill.

WAREHOUSEMEN (3)—RECEIPTS—NEGOTIABILITY. A company having no warehouse of its own and doing no business for the public, organized as a device by which a bank could furnish negotiable warehouse receipts as collateral security for loans to a manufacturing company, is not a "'warehouseman" authorized to issue negotiable warehouse receipts, within Rem. Code, § 3369-58, defining a warehouseman as "a person lawfully engaged in the business of storing goods for profit"; hence the bank did not acquire title by virtue of its warehouse receipt denominated on its face as negotiable; since the carrier was justified, under Rem. Code, §3385-12, in delivering the goods to the consignee named in a nonnegotiable bill of lading.

SALES (150) — ACTION FOR BREACH — CONDITIONS PRECEDENT — ABILITY AND READINESS TO PERFORM. A party claiming damages for breach of contract to deliver box shooks, need not allege or prove ability and willingness to perform on his part, where before the time for performance the other party gave notice that it would not perform.

Appeal from a judgment of the superior court for King county, Smith, J., entered June 20, 1919, upon findings in favor of the plaintiff, in an action on a bill of exchange, tried to the court. Reversed.

[1] Reported in 186 Pac. 1072.

W. H. Bolen, for appellant.

George A. Joiner and *J. L. Corrigan,* for respondent.

MAIN, J.—The purpose of this action was to recover upon a bill of exchange claimed to have been conditionally accepted by the defendant. The case was tried to the court without a jury, and resulted in findings of fact, conclusions of law and judgment sustaining the plaintiff's right to recovery. From this judgment, the defendant appeals.

The facts are substantially as follows: The Red Cedar Company operated a mill at Anacortes in which was manufactured box shooks. The appellant, with offices in the city of Seattle, was engaged in the brokerage business, and in such business bought and sold box shooks. On October 1, 1918, the appellant contracted with the Red Cedar Company for the purchase of 500,000 salmon box shooks, which were to be manufactured and delivered subsequent to the 1st of January following. On October 7, 1918, the appellant contracted with the Red Cedar Company for not less than 75,000 nor more than 100,000 milk box shooks. On January 1, 1919, and before any of the salmon box shooks had been manufactured or delivered, the Red Cedar Company notified the appellant that it would be unable to "furnish any part of the salmon shooks." The milk box shooks which were covered by the contract of October 7, or part of them, were sold to the dairy products company doing business at Snohomish. On January 11, in pursuance to a request from the appellant, the Red Cedar Company consigned for shipment a carload of box shooks over the Great Northern Railway Company to the Snohomish Dairy Products Company. The shooks were in no instance shipped direct to the appellant. The method of doing business was that, after the appellant would make a sale of the

shooks, he would notify the Red Cedar Company to ship direct to his customer. When the shooks were delivered to the railroad company at Anacortes, a non-negotiable bill of lading was taken in which the dairy products company was named as consignee and the Citizens Bank of Anacortes, the respondent, as consignor. The bank had loaned the Red Cedar Company a considerable sum of money, and in order to secure the same, the officers and members of the Red Cedar Company had organized a warehouse company under the name of the Fidalgo Warehouse Company. When the shooks were manufactured, they were placed in a separate room or shed on the premises of the Red Cedar Company and a negotiable warehouse receipt was issued therefor in the name of the Fidalgo Warehouse Company. This receipt was deposited with the bank as collateral. This accounts for the fact that the bank was named in the bill of lading as the consignor. After the bill of lading was issued, it was taken to the bank and a sight draft was drawn upon the appellant by the Red Cedar Company. The draft and the bill of lading were turned over to the bank and were forwarded to the Dexter Horton Bank at Seattle with instructions to present the draft to the appellant for acceptance, which was done on January 13. The appellant declined to accept the draft, and wrote the Red Cedar Company this letter:

"We were presented with a draft for $1,398 with Snohomish Dairy Products Co. bill of lading attached covering car milk box shooks. We instructed you on the 9th inst. to ship direct to Snohomish Dairy Products Co. so kindly notify the Dexter Horton Bank to forward bill of lading to Snohomish Dairy Products Co. in order that they may unload and inspect the shooks according to our instructions. We are not buying any 'cat in a bag,' from the Red Cedar Company

and will not pay any draft until the milk boxes are all checked out and inspected by our customer."

After this letter was received by the Red Cedar Company, it was shown to the president of the Citizens Bank of Anacortes, who thereupon notified the Dexter Horton Bank to forward the bill of lading to the Snohomish Dairy Products Company and hold the draft. The Dexter Horton Bank did as instructed. In due time the dairy products company received, inspected and accepted the carload of shooks, and paid the appellant for the same. After the payment had been received, the appellant wrote the Red Cedar Company a letter stating that he had received payment from the Snohomish Dairy Products Company and would hold the same against the losses that he had sustained by reason of the fact that the Red Cedar Company had breached its contract to furnish the 500,000 salmon box shooks. A short time thereafter, the Citizens Bank of Anacortes, the respondent, brought the present action upon the draft, and also claiming to have been the owner of the shooks at the time they were delivered to the Great Northern Railway Company for shipment.

To the complaint, the appellant pleaded an affirmative defense, alleging that the damage he had sustained by reason of the breach of the salmon contract more than consumed the money which he had received from the Snohomish Dairy Products Company, and claiming the right of offset.

The first question is whether the respondent can prevail upon the theory that the draft was conditionally accepted by the appellant. This acceptance, if it was such, was written not upon the draft itself, but upon a separate paper, namely, a letter, a copy of which is above set out. The statute (Rem. Code, § 3524) provides that:

"Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of the person to whom it is shown and who, on the faith thereof, receives the bill for value."

The letter was shown to the respondent on the 14th day of January. Prior to this and on the 11th day of January, it had received the draft from the Red Cedar Company. It did not, therefore, "receive the bill for value" on the faith of the letter. It is true that, in reliance upon the letter, the bank directed that the bill of lading be sent to the dairy products company, the consignee, but this does not bring it within the statute. Under the bill of lading act (Id., § 3385-12) the carrier would have been justified in delivering the shooks to the consignee named in the nonnegotiable bill without its presentation. Much is said in respondent's brief with reference to the letter above set out being a trick by which it fraudulently was enabled to receive the payment from the dairy products company without first accepting the draft. While the letter is not frank and candid and is not to be commended, it does not deprive the appellant of his legal rights. The respondent cannot prevail upon the draft because, construing the letter as a conditional acceptance, it did not receive the bill for value in reliance thereon. As already stated, the bill had been received several days prior to the presentation of the letter. The rule, as stated in 3 R. C. L., page 1305, is:

"The result of the authorities may be stated to be, that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise."

This is substantially the rule of the statute.

The respondent not being able to prevail upon the draft, the next question is whether it can recover as owner. If it is in the position of owner, it must be by virtue of the warehouse receipt issued by the Fidalgo Warehouse Company, which is denominated on its face as negotiable. This presents the question whether the Fidalgo Warehouse Company was a "warehouseman" within the contemplation of the uniform warehouse receipts act (Rem. Code, §§ 3369-1 to 3369-61). Section 1 of this act provides that "warehouse receipts may be issued by any warehouseman, and must be issued in manner and form as provided by this act." In § 3369-58, "warehouseman" is defined to mean "a person lawfully engaged in the business of storing goods for profit." In this case the Fidalgo Warehouse Company had no separate building of its own; it did not store goods for the public generally or at all; it only stored the product of the Red Cedar Company in a room or shed upon the premises of that company. It was simply a device by which the bank was furnished negotiable warehouse receipts as collateral security for the loans which it had made to the Red Cedar Company. The evidence fails to show that the warehouse company was storing goods for profit, and therefore it would not come within the statutory definition. A quotation from *National Bank of Commerce of Kansas v. Flanagan Mills & Elevator Co.*, 268 Mo. 547, 575, 188 S. W. 117, will state the general rule, supported by the authorities:

"When the whole transaction is placed in evidence, it appears that Flanagan Mills & Elevator Company was a milling concern, and only handling and storing grain and mill products to be used in the ordinary course of its business. It was not a warehouseman either at common law or under the statute, because

not engaged in the business of receiving and storing goods, wares, and merchandise for others. In such case the mere form of the receipt is not sufficient to make it a warehouse receipt. Proof must be made that the party issuing the receipt was in fact a warehouseman. No such proof appears in this case, but in fact the proof is to the contrary."

Since the bank acquired no title under the warehouse receipt negotiable in form, for the reason stated, it follows that it cannot recover as owner. It had no contract with the appellant relative to the shooks, and was not known by the appellant in the transaction except through the presentation of the draft.

One other question will be considered. Treating the delivery of the draft by the Red Cedar Company to the bank as an assignment of the claim, the question upon the offset pleaded by the appellant arises. The respondent claims that this defense must fail because it is not alleged and proven that appellant was ready and able to perform the salmon shook contract for the breach of which damages are claimed as an offset. The damages flowing from the breach of this contract, as shown by the evidence, were more than sufficient to consume the amount of the draft. Before the time named in the contract for the delivery of the salmon shooks, the Red Cedar Company breached the contract and notified the appellant that it would not perform it. In such a case, the party relying upon the breach for the recovery of damages is not required to allege and prove ability and readiness to perform. 13 C. J. 764; *Chicago House Wrecking Co. v. James H. Rice Co.*, 67 Ill. App. 686; *Wolf v. Willits*, 35 Ill. 88.

The respondent being unable to recover either upon the theory of conditional acceptance of the draft or upon that of owner, and the appellant having successfully maintained his defense of offset, no recovery can be had in this case.

The judgment will be reversed, and the cause remanded with direction to dismiss the action.

Reversed.

HOLCOMB, C. J., PARKER, MITCHELL, and MACKINTOSH, JJ., concur.

[No. 15542. Department Two. January 13, 1920.]

FRANK I. ZENOR, *Respondent*, v. SPOKANE & INLAND EMPIRE RAILROAD COMPANY, *Appellant*.[1]

MASTER AND SERVANT (20-21)—WORKMEN'S COMPENSATION ACT—"PLANT"—CITY BRIDGE. A city bridge over wires and tracks of an electric railway company, over which the city, for the purpose of repairs, has exclusive control, is a part of the "plant or premises" of the city within the meaning of the workmen's compensation act, Rem. Code, § 6604-3, abolishing civil remedies and establishing industrial insurance for employees in extra hazardous employments, if injured "upon the premises or at the plant," in the course of their employment; so that the act applies to a bridge carpenter injured by contact with the electric wires of the company while engaged in repairing the bridge.

Appeal from a judgment of the superior court for Spokane county, Oswald, J., entered February 4, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee through contact with electric wires. Reversed.

Graves, Kizer & Graves, for appellant.

E. O. Connor, for respondent.

TOLMAN, J.—Respondent, at the time of receiving the injuries hereinafter referred to, was employed by the city of Spokane as a bridge carpenter, and was then engaged in the repair of a wooden bridge belonging to the city, which bridge carried the traffic of Sec-

[1] Reported in 186 Pac. 849.

ond avenue above and over the tracks of appellant. At the time when appellant constructed its tracks and strung its wires, there was no overhead crossing at Second avenue. Some years later the city constructed the bridge in question, the lower framework of which cleared appellant's electric wires by but a few inches, and has since maintained it as a part of the public street. At the time in question, the city bridge foreman, with a crew of men, set about to repair the bridge. Respondent and another workman were by the foreman directed to go beneath the floor or surface of the bridge and loosen certain bolts which were a part of the structure, and while engaged in this work, respondent in some manner came in contact with appellant's wires carrying a high voltage of electricity, and was seriously injured. This action was brought to recover damages for such injuries, it being alleged that appellant was negligent in placing and maintaining uninsulated wires carrying a high voltage of electricity in close proximity to the supporting timbers and braces of the bridge, where one engaged in repairs might come in contact with them. In addition to the usual defenses, appellant, by answer, pleaded that respondent was employed by the city in working upon and about its bridges; that the city was then paying to the industrial insurance commission premiums covering such employment (which facts appear to be established by the evidence), and that respondent's injuries came within the provisions of the workmen's compensation act, and his sole remedy therefor lies with the industrial insurance commission.

The case was tried to a jury, and at the close of all the evidence, appellant moved that the case be taken from the jury and judgment entered in its favor, for the reason that the court had no jurisdiction, and because respondent's sole remedy was to apply for com-

pensation under the workmen's compensation act. This motion was denied and the cause submitted to the jury, which returned a verdict in respondent's favor. Appellant then moved for judgment in its favor *non obstante veredicto,* which motion was also denied, and a judgment was entered on the verdict, from which this appeal is prosecuted.

The workmen's compensation act, after providing:

"The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided." (Rem. Code, § 6604-1.)

further provides:

"Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in section 6604-4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer: Provided, however, that if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other." (Rem. Code, § 6604-3.)

Respondent contends that the bridge upon which he was working at the time he was injured was neither

the premises nor plant of his employer, and that he is therefore entitled to elect whether he will seek compensation under the act, or sue the wrongdoer under the proviso just quoted. From the beginning, this court has construed the act as meaning what it says; *i. e.*, that the common law right of action for damages accruing from an injury received by a workman in the course of his employment is abolished, except as in the act otherwise provided. *State ex rel. Davis-Smith Co. v. Clausen,* 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466, 2 N. C. C. A. 823, 3 N. C. C. A. 599; *Peet v. Mills,* 76 Wash. 437, 136 Pac. 685, Ann. Cas. 1915 D 154, L. R. A. 1916 A 358; *Ross v. Erickson Construction Co.,* 89 Wash. 634, 155 Pac. 153, L. R. A. 1916 F 319; *Stertz v. Industrial Insurance Commission,* 91 Wash. 588, 158 Pac. 256, Ann. Cas. 1918 B 354, and the inquiry here is therefore limited to the one question of whether or not the facts shown are sufficient to give respondent the right of election provided for in the act. The words "plant" or "premises" are elastic terms and have been variously defined by the courts, but we find nothing from other jurisdictions which is decisive here.

In *Carlson v. Mock,* 102 Wash. 557, 173 Pac. 637, we held that the word "plant" was intended by the legislature to include no more than that part of the employer's fixed property over which he has exclusive control, and not to include a street car track upon a public street, over which the employer had no oversight, and no means of protecting an employee from the negligent or wrongful acts of third persons. From the reasoning in that case it would seem almost to follow as a matter of course that, in this case, the bridge upon the city street, of which the city is the owner, over which it exercises control, and may, for the purpose of

repair, wholly exclude the public therefrom and take any and every necessary step to insure the safety of its employees while engaged thereon, must be held to be part of the plant or premises of the city. The fact of the city's ownership of the bridge, qualified though it be (see 2 Dillon, Municipal Corporations, § 662; *Chicago v. Wright,* 69 Ill. 318; 1 Elliott, Roads and Streets (3d ed.), § 52), its duty to maintain and keep it in repair, and its control over and right to regulate its use for the purpose of protecting the workmen there employed, as well as the public generally, seem, in the light of what was said in *Stertz v. Industrial Insurance Commission,* and *Carlson v. Mock, supra,* to establish with reasonable certainty that the bridge was the city's premises and plant within the meaning of the act; especially so where, as here, the injury was not inflicted upon the highway, but at a point below the surface where the general public had no right to be and where, it is argued, the city had itself created the dangerous condition by building the bridge in close proximity to the wires already there, without requiring their insulation or removal.

We conclude that the learned trial court erred in not granting appellant's motion for judgment. Judgment reversed.

HOLCOMB, C. J., BRIDGES, FULLERTON, and MOUNT, JJ., concur.

[No. 15495. Department Two. January 15, 1920.]

E. S. JORDAN, *Appellant*, v. SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, *Respondent*.[1]

TRIAL (56, 58)—TAKING CASE FROM JURY—NONSUIT. In order to sustain a nonsuit it must appear as a matter of law that there was neither evidence nor reasonable inference therefrom which would have sustained a verdict in plaintiff's favor.

NEGLIGENCE (3)—FIRES—DUTY TO CONTROL. An owner of premises must exercise reasonable care to prevent the spread of fire, started on his premises without his fault.

SAME (3). Negligence on the part of a railroad company in permitting a fire, discovered on its premises, to spread to plaintiff's property may be inferred, and plaintiff makes out a prima facie case, where there was evidence that defendant had knowledge of it when it was a small affair easily extinguishable, with men at hand for the purpose, and that the season was unusually dry and the surroundings easily ignitable.

TRIAL (13)—VIEW—DISCRETION. It is within the discretion of the trial court to grant or deny a request that the jury be permitted to view the premises.

Appeal from a judgment of the superior court for Spokane county, Carey, J., entered April 17, 1918, upon granting a nonsuit, dismissing an action for damages to property destroyed by fire. Reversed.

J. S. McDonald and *Ayers, McDonald & Greenough*, for appellant.

Cannon & Ferris, for respondent.

TOLMAN, J.—This appeal is from a judgment of nonsuit entered at the close of plaintiff's case, and in order to sustain the judgment it must appear, as a matter of law, that there is neither evidence nor reasonable inference therefrom which would have sus-

[1] Reported in 186 Pac. 875.

tained a verdict in plaintiff's favor. *Godefroy v. Hupp,* 93 Wash. 371, 160 Pac. 1056, Ann. Cas. 1918E 494; *Fobes Supply Co. v. Kendrick,* 88 Wash. 284, 152 Pac. 1028.

Appellant, as plaintiff below, brought this action to recover damages to his property caused by a fire alleged to have been set by respondent company, its servants and agents, and by them permitted to remain and burn on its right of way, and negligently and carelessly allowed by them to escape therefrom onto appellant's land adjoining, there consuming his property and causing the damages complained of. There is evidence that the fire was first seen by a neighbor burning on respondent's right of way on the side of the track opposite from appellant's land, and in the language of the witness:

"A. It was on my side of the track where there had been a construction track built upon the right of way, they called it the overland track, and the fire was burning up onto that track and I went and asked the section men, I suppose it was the section men working on the track, and they came and helped me fight the fire out on that side, and I seen the fire on the other side of the track between the track and the railroad. Q. What was it burning there? A. That was ties and peat. Q. When did you next see the fire and where was the fire? A. Then the next day I came out to watch that fire again and I seen where the fire had gone over this waste dump along somewhere close to the bluff, I do not remember whether it was fifty yards away from the bluff or not, but there was one fire close to the bluff and the main fire over here because there was ashes there where it burned. Q. Where did it go when it went over the bluff? A. Went onto the Jordan—or on the other piece of the right of way, and then on Jordan's land, having burned over, and then up on the scab land, timber land with some bunch grass in it and it was burning the hay stack when I came from my place, that is what called my attention to it."

This appears to be the only evidence as to the origin of the fire, the only knowledge of its existence brought home to respondent, and the only evidence tending to show what respondent did or failed to do in the matter of preventing the spread of the fire onto appellant's property. But with this may also be considered other evidence in the case, to the effect that the fire occurred at the dryest season of an unusually dry year, and that the land, both on the right of way and that of appellant adjoining, as well as the embankment thrown up along the line which divided them, was all of a peaty nature which held and permitted fire to spread readily.

Respondent's main argument here is that there was no evidence as to the origin of the fire, no evidence that respondent failed to use reasonable means to prevent its escape and spread, and that negligence will not be presumed. In other words, that the burden was on appellant to offer evidence to show that respondent, after knowledge of the existence of the fire on its property, did not use reasonable means to prevent its escape onto the land of appellant. While, on the contrary, appellant contends that, having offered evidence of the existence of the fire on respondent's property, evidence tending to show knowledge thereof on the part of respondent, and evidence tending to show the escape of the fire to appellant's land, the jury might draw the inference therefrom that respondent negligently omitted to use reasonable means to prevent such escape and spread. In *Sandberg v. Cavanaugh Timber Co.*, 95 Wash. 556, 164 Pac. 200, referring to the duty of one on whose premises a fire is started by some agency not under his control, Judge Parker, speaking for the court, said:

"The decisions touching this exact question, however, seem to be in harmony in holding that there is a measure of responsibility on the part of an owner

growing out of such a situation which requires him to use reasonable effort to prevent the spread of a fire occurring upon his premises, apart from his own act or neglect attending the starting of the fire, which may render him liable to his neighbor as for negligence."

And in the same opinion quotes from the language of Judge Bunn in *Farrell v. Minneapolis & Rainy River R. Co.*, 121 Minn. 357, 141 N. W. 491, 45 L. R. A. (N. S.) 215, as follows:

"Was there a legal duty resting on defendant to use reasonable care to prevent the spread of this fire? We think there was. This is not holding that a railroad company must make its right of way a barrier to prevent the spread of fires for the starting of which it is not responsible, nor does a decision that such a duty rested on defendant establish any new doctrine. It is an application of the old rule of '*sic utere tuo.*' If a fire started on the right of way of a railroad, or on land of a private owner by the carelessness of boys, the matches of smokers, or from any cause for which the landowner is not responsible, and the latter knows of the fire and knows that if not controlled it will spread and destroy valuable property of his neighbor, there is a duty to use reasonable care to prevent this result."

While these authorities do not discuss the exact question raised here, they are quoted to show the duty devolving upon one upon whose premises a fire starts without his fault, which duty must be borne in mind in order to intelligently discuss the question here raised. In *McCann v. Chicago, Milwaukee & Puget Sound R. Co.*, 91 Wash. 626, 158 Pac. 243, plaintiff's evidence showed fires on defendant's land early in the afternoon, and one starting on his own land a few hours later, with a strong wind blowing from the former in the direction of the latter, and the jury appears to have been permitted to draw the inference that no reasonable efforts were put forth to prevent the spread of the fire.

In *Stephens v. Mutual Lumber Co.*, 103 Wash. 1, 173 Pac. 1031, this court, speaking through Judge Chadwick, said:

"The real question is whether appellant used ordinary prudence. There is no testimony tending to show that it did not, while there is testimony that 100 or 1,000 men could not have stayed the flames after the sudden change in the wind."

And the conclusion is reached therefrom that the motion for judgment *non obstante veredicto* should have been granted. But this was after testimony from both sides, and it might very well be said that an inference proper to be drawn by the jury in the absence of any testimony might, as a matter of law, be wholly improper where there is before it evidence in detail from both sides as to just what was done and what left undone. In fact, in the *Stephens* case, the testimony conclusively overcomes any inference of want of reasonable care.

We have examined with care all the authorities cited by respondent and find none which goes to the extent necessary to support its contentions here. We believe the better rule, and the one most consonant with the right to a jury trial, is that contended for by appellant; and in this case the fact of the fire being on respondent's premises being shown, there being evidence offered from which the jury might find that it had knowledge thereof when it was but a small affair easily extinguishable, such as had been extinguished on the other side of the right of way, with men at hand sufficient for that purpose; that the season was unusually dry, and the surroundings easily ignitable, and that, after the lapse of some interval of time, the fire was communicated to appellant's premises, might reasonably draw the inference, in the absence of any evidence to the contrary, that respondent could, by the

exercise of ordinary care, have extinguished the fire before it was so communicated, and that it was negligent in not so doing. The motion for a nonsuit should have been denied.

The question of whether the appellant was himself guilty of negligence was also one for the jury.

It was within the discretion of the trial court to grant or deny appellant's request that the jury be permitted to view the premises where the damage occurred, and there is nothing shown to warrant us in holding that there was an abuse of discretion in the ruling complained of.

The judgment is reversed, with instructions to grant a new trial.

HOLCOMB, C. J., MOUNT, BRIDGES, and FULLERTON, JJ., concur.

[No. 15538. Department One. January 15, 1920.]

PACIFIC FRUIT & PRODUCE COMPANY, *Appellant*, v. NORTHERN PACIFIC RAILWAY COMPANY, *Respondent*.[1]

CARRIERS (8-1)—OF GOODS—REFUSAL TO ACCEPT—LIABILITY. It is primarily a carrier's duty to accept a shipment and furnish suitable equipment under a requested optional service, published in its tariff, but it is not liable if its failure was due to an unprecedented shortage of cars and conditions which it could not reasonably anticipate or avoid.

CARRIERS (7)—CONTRACTS—TARIFFS. An interstate carrier can enter into no contract of transportation not expressly authorized in its published tariffs.

SAME (8-1)—REFUSAL TO ACCEPT GOODS—PLEADING—DEFENSES. In a shipper's action for damages to apples frozen in transit, the carrier's answer states a good defense, where it appears that its published tariffs provided an optional service, one at shipper's risk and the other at a higher rate at the risk of the company, which latter

[1] Reported in 186 Pac. 852.

required refrigerator cars, that, upon plaintiff's demand for such service, the company used due diligence to obtain refrigerator cars, but from unprecedented conditions was unable to do so, whereupon plaintiff elected to accept the other service, which called for box cars, stoves, and a shipper's attendant, and signed a contract for such service in which he assumed all risks, and that the shipper's loss was due to failure to properly prepare the car and to the negligence of his agent attending the shipment.

Appeal from a judgment of the superior court for Yakima county, Taylor, J., entered April 30, 1919, dismissing an action for damages, upon overruling a demurrer to the answer and the refusal of the plaintiff to plead further. Affirmed.

Sydney Livesey, for appellant.

J. W. Quick, Geo. T. Reid, L. B. da Ponte, and *Rigg & Venables,* for respondent.

MITCHELL, J.—This action was disposed of by the superior court in favor of the defendant, upon the refusal of the plaintiff to further plead after the entry of an order overruling a general demurrer to affirmative defenses to the amended complaint. The plaintiff has appealed.

The amended complaint alleges, in effect, that appellant is a corporation engaged in the fruit and produce business at Yakima, Washington, and on December 4, 1916, delivered to the respondent, a common carrier, at Yakima, Washington, a carload of apples to be transported to Wichita, Kansas. That, at the time of delivery, respondent had in effect, governing such shipments, a tariff which provided for two kinds of service, and for which different charges were made. That one kind of service was known as "option one," and was upon condition that the shipper assume responsibility for loss or damages occasioned by frost, freezing or overheating; and the other kind was known as "option two," which provided that the carrier as-

sumed the responsibility for loss or damage occasioned by frost, freezing or overheating. That the charge for option two service was $24 in excess of the other kind, between the places mentioned. That, at the time of delivering the carload of apples, appellant demanded that it be permitted to enter into option two contract, which it was ready, willing and able to perform, but that respondent refused to enter into such contract and refused to transport the shipment under any contract other than option one, which appellant was compelled to, and did, accept. That respondent, disregarding its duty as a common carrier and knowing the perishability of the shipment, refused to furnish a suitable car for the service required, and that respondent knew the car provided was unsuitable for safely carrying the apples in the event there was severe cold weather and freezing temperature to which the apples would be subjected. That, in the course of transportation, the apples were frost-bitten and frozen, causing the damages complained of in this action. That a claim for the amount of the damages was presented to the respondent, which refused to pay the same, or any part thereof.

In the first affirmative defense — the only one we deem it necessary to consider—the respondent alleged, in effect, that it is a common carrier engaged in interstate commerce. That, at the date of receiving the shipment in question, and at all times since November 8, 1915, it had in effect a tariff providing for two kinds of service for the transportation of perishable freight, one called option one and the other option two. That, under the terms of option one contract, the shipper assumes liability for loss due to frost or freezing, but if, in the shipper's judgment, it is necessary to use lining, false flooring, or to install stoves, he might do so at his own expense, provide fuel (being

allowed a deduction from the weight of the car to offset the weight of such equipment), and a caretaker would be transported by the carrier to take care of the shipment, and the caretaker and stove would be returned free of charge. That, under the terms of option two contract, the carrier assumes liability for loss due to frost or freezing, but in such case there is a charge over that made for service under option one contract. That, under its published tariff, it could lawfully transport the apples only under one or the other of said two contracts. That, where the shipper desired to ship under option two, it was the duty of respondent to provide a refrigerator car, which was the only car constructed so that apples could be safely transported in transcontinental movement in the month of December, and the only kind of car in which apples could be moved, or ever have been moved, under option two contract—which fact was well known to both parties at all times—and that respondent never had undertaken the responsibility entailed by option two contract except for shipments moving in refrigerator cars. That, prior to December, 1916, it had made ample provision for moving the apple crop of the Yakima country, and at that time it owned enough refrigerator cars to answer all demands it could or did reasonably anticipate, and except for an unavoidable shortage of them would have been able to furnish one to appellant for its shipment. That, in the month of September, 1916, there was a heavy east-bound movement of soft fruits and other perishable freight from Yakima that required refrigerator cars furnished by respondent for the safe transportation of such fruit destined to points beyond its line. That it was unsafe and impracticable to transfer such freight to the cars of connecting carriers, and, in addition, respondent was a party to duly published through joint rates that necessitated its re-

frigerator cars going through to destination, and further, that the connecting carriers did not have refrigerator cars into which the fruit could have been transferred. That, in prior years, its refrigerator cars had always been returned in ample time to remove the Yakima apple crop during the usual shipping period from October to the following January, but in December, 1916, its supply of refrigerator cars was for the first time detained by connecting carriers, and although respondent made every effort to get them returned [including necessary applications to the interstate commerce commission, as shown by its car supply investigation decision reported in 42 I. C. C. R. 657, made a part of the answer], it was unable to do so, and that, on or about December 4, 1916, there were so detained 2,333 of its refrigerator cars. That, in the fall and as late as December, 1916, there was an unusual demand for refrigerator cars to transport apples, potatoes and other perishable goods, because never before had there been any considerable movement east of potatoes from the Yakima section; but in that year, due to the failure of the potato crop in the middle west and elsewhere, there was a heavy east-bound movement from Yakima and vicinity, requiring the use of 1,000 refrigerator cars, which respondent was compelled to supply, all of which would otherwise have been available for moving the apple crop that fall and winter, as respondent had reasonably expected. That, according to its custom, respondent made diligent investigation in advance that year to ascertain the size of the apple crop, but that withal the crop greatly exceeded its estimate, and that, because of the lateness of the season and delay in picking and packing, the apple crop was offered for shipment so much later than theretofore as to cause such an unprecedented accumulation of the crop and demand for refrigerator

cars for shipment between November 15th and December 15th that respondent, notwithstanding its care and precautions, but because of its unavoidable shortage of cars, was unable to furnish refrigerator cars for the movement in one month of a volume of such business that had always extended over a period of six weeks or two months. That, because of such situation and without any fault of respondent, it could not promptly furnish a refrigerator car to appellant under option two contract, but that, as it was legally bound to do, it offered to furnish a box car for the transportation of apples under option one contract; whereupon appellant elected to use a box car and entered into option one contract, and so shipped its apples, and appellant undertook to properly prepare said cars to contain apples, and installed a stove and sent a caretaker in charge, well understanding respondent's inability to supply a refrigerator car at that time, and well knowing that a box car was not suitable for the transportation of apples on such a trip at that time, and with full knowledge of such facts shipped its apples under option one contract, paid the rate of freight provided for such shipments, prepared the car as it saw fit, and assumed all risk of loss or damage to the shipment from frost, freezing and overheating, as provided by the contract; and that, if said apples were damaged by frost and freezing, as alleged, it was due to a risk assumed by appellant and to the negligence of appellant in failing to properly floor, line and prepare said car, and to the carelessness of appellant's agent in charge of the shipment in failing to give it the necessary care and attention.

Primarily, it was the duty of respondent to accept the shipment under its ordinary common law liability for any injury or damage thereto in transit expressed in option two contract, which was the service requested

by the appellant. Further, it is a carrier's duty to furnish suitable equipment, and if freight be damaged in consequence of its failure in this particular, it is liable to the shipper therefor. Applying these well settled principles, it is clear a cause of action is stated in the amended complaint; for respondent not only refused to enter into a contract by the terms of which it would become liable for damages, according to the common law, its tariff and the acts of Congress regulating interstate commerce, but it also refused to furnish a car which would protect the shipment from such damage.

The only question, therefore, is, Does the affirmative defense state facts sufficient to save respondent from the liability shown in the amended complaint? A carrier in interstate commerce can enter into no contract of transportation for which there is not express authority in its filed and published tariffs. *Texas & Pacific R. Co. v. American Tie & Timber Co.*, 234 U. S. 138.

The duly filed and published tariff applicable in this case provided two kinds of service for moving perishable freight, such as apples, at the choice of the shipper; the one under option one contract, at the risk of the shipper; the other under option two contract, at the carrier's risk. It is alleged in the answer that the refrigerator car was the only car constructed so that apples could be safely transported between the points mentioned in the month of December, and the only kind of a car in which apples could be moved, or ever have been moved, under the terms of option two contract, which fact was well known to appellant. It is further alleged that, prior to December, 1916, respondent had made ample provision for moving the apple crop of the Yakima section and, at that time, owned refrigerator cars sufficient to respond to all demands

it could, or did, reasonably anticipate, and was prevented from supplying one to appellant only because of an unlooked-for, unsual and unavoidable car shortage, together with an irregular harvesting and congested shipping conditions of the apple crop. All of these facts, set out in detail, are, of course, admitted by the demurrer. As shown by the report of the interstate commerce commission in its car supply investigation ending in December, 1916: "The present conditions of car distribution throughout the United States have no parallel in our history." 42 I. C. C. Rep. 657. That investigation was, in part, at the instance of this respondent, which at that time, as alleged in its affirmative defense, was suffering from a shortage of 2,333 refrigerator cars. It seems to be the well settled rule that, while railroad companies are bound to furnish suitable cars for their usual and ordinary traffic, they are not liable for failure to furnish such cars in times of car shortage occasioned by unprecedented and unforeseen demand for such cars, by abnormal prolonged car detentions on connecting lines, or other extraordinary causes and circumstances which could not have been foreseen and against which it was in reason impossible to provide. *Pennsylvania R. Co. v. Puritan Coal Mining Co.*, 237 U. S. 121; *Houston & Texas Cent. R. Co. v. Mayes*, 201 U. S. 321; *Interstate Commerce Commission v. Illinois Cent. R. Co.*, 215 U. S. 452; 4 R. C. L., § 150, page 674; 10 C. J., § 67, page 73.

Abundant facts are alleged in the answer to bring the respondent within the rule of exemption from liability for its failure to supply appellant with a refrigerator car—the only kind of car suitable for the service under option two contract—on December 4, 1916.

Calling attention to a portion of supplement No. 7 to the tariff, which is as follows:

"1. (a) Under the provisions of this section of Tariff the terms 'Perishable Freight' will include:

"Any article requiring protection from cold, either by use of refrigerator or other insulated car, by artificial heat, or by both, including . . . Fruits, Fresh, . . ."

appellant argues that, because it speaks of the use of refrigerator or other insulated cars, by artificial heat, or both, it so modifies or controls the general tariff as to compel the common law liability of the carrier, regardless of cars, so that, in the event respondent was unable to supply a refrigerator car, it nevertheless was bound to make the shipment in a box car at its own risk. The argument is not justified. The whole of supplement 7, as set out in the pleadings, shows it still preserves the rights and obligations of the shipper and carrier under the two kinds of contracts, option one and option two, as to that feature involved in this controversy; and besides, the language quoted and relied on by appellant shows upon its face it is intended to enumerate what shall be included in the term "perishable freight," and is easily separable from the subject-matter of the terms of the contracts with reference to the manner in which such freight shall be transported.

Judgment affirmed.

HOLCOMB, C. J., MAIN, MACKINTOSH, and TOLMAN, JJ., concur.

[No. 15372. Department One. January 19, 1920.]

THE STATE OF WASHINGTON, *Respondent*, v. J. HARWOOD MORRIS, *Appellant*.[1]

CRIMINAL LAW (111)—EVIDENCE—OTHER OFFENSES—INTENT. In a prosecution of a bank officer for embezzlement of a special deposit, upon an issue as to whether he was authorized to use the funds for a time for his own purposes, testimony that he had previously used part of the same fund without authority is admissible to throw light on his intentions, and is not objectionable as evidence of other crimes.

WITNESSES (126-1)—IMPEACHMENT—COLLATERAL ISSUES. In a prosecution of a bank officer for embezzlement of a special deposit received from an executor, the executor's account filed in court is inadmissible to impeach the executor's testimony that defendant had requested him to transfer the fund to his personal checking account, as it introduced a matter foreign to the issue.

CRIMINAL LAW (143) — EVIDENCE — CERTIFIED COPIES — ADMISSIBILITY. In a prosecution of a bank officer for embezzlement of a special deposit part of which was used to pay a judgment against a member of defendant's firm, certified copies of the pleadings in that case are admissible for the purpose of showing that the judgment was against such partner and not against the bank.

SAME (102, 135)—EVIDENCE—RES GESTAE—SELF-SERVING DECLARATIONS. In a prosecution of a bank officer for embezzlement of a special deposit, which he claimed he was authorized to use for his own purposes for a time, self-serving declarations to that effect, claimed to have been made by him to a third person immediately after receiving the deposit, are inadmissible as part of the res gestae, as it was merely a reference to a past transaction.

EMBEZZLEMENT (14)—EVIDENCE—ADMISSIBILITY. In a prosecution of a bank officer for the embezzlement of a special deposit which he had collected on a draft from another bank and later obtained on a cashier's check of his bank, the state of the account between the two banks at the date of a subsequent failure is properly excluded as immaterial.

SAME (20)—BANKS AND BANKING (20)—DEPOSITS—OWNERSHIP. In a prosecution of a bank officer for the embezzlement of a special deposit, it is proper to instruct that upon either a general or special

[1] Reported in 187 Pac. 350.

deposit the money becomes the property of the bank; especially in view of Rem. Code, § 2303, subd. 16, providing that any person shall be deemed an "owner" of any property who has a general or special property in it.

Appeal from a judgment of the superior court for King county, Back, J., entered March 30, 1918, upon a trial and conviction of grand larceny. Affirmed.

Bausman & Oldham, for appellant.

Fred C. Brown and *Chas. Ethelbert Claypool* (*Frank P. Helsell,* of counsel), for respondent.

MITCHELL, J.—Appellant was convicted of the crime of grand larceny, and has appealed from the judgment and sentence imposed. The charging part of the information is that he, on February 17, 1915, being an agent and officer of the Fremont State Bank, and having under his control, as such agent and officer, the sum of $588.55 in money, the property of the Fremont State Bank, did appropriate the same to the use of himself, Charles E. Remsberg and S. P. Dixon, copartners doing business under the firm name of S. P. Dixon & Company, with intent to defraud the Fremont State Bank.

Appellant was connected with the bank from the date of its incorporation in 1907, and was its cashier in 1915. He was also a member of the real estate firm of S. P. Dixon & Company, a copartnership consisting of Remsberg, Dixon and himself. One of the bank's customers, whose business had been solicited by appellant, in the month of November, 1911, deposited $5,067.20 held by him as executor of an estate. The customer and the appellant were warm friends, and the money was placed in the bank by having appellant call at the customer's office, where a draft in favor of the customer was delivered to appellant for making the deposit. The draft, which never passed through the Fremont

State Bank, was indorsed "Fremont State Bank, Seattle, by J. Harwood Morris, Cashier," and collected through the Seattle National Bank. On the books of the Fremont State Bank, the deposit was entered by appellant, identified by the depositor's name, and carried in what appellant termed or designated "Special Accounts," which also included deposits of others made from time to time that were identified in the same manner. Appellant's defense was that the deposit was made with the understanding that he could use the money as he wished in his own personal affairs for at least a year, the time required to close the estate the depositor was handling as executor, or until the estate was actually closed. The depositor positively denied there was any such agreement. In February, 1915, it appears that the firm of S. P. Dixon & Company was in need of funds. It undertook to sell a piece of real property belonging to it, the title to which stood in Remsberg's name. It was covered by the lien of an unpaid judgment against Remsberg in the sum of $588.55. The firm being in need of all the money for which the property was sold, it was decided by appellant to pay the judgment out of the trust fund theretofore deposited in the bank by the executor. A cashier's check in favor of the judgment creditor in the sum of $588.55 was issued out of the bank, without its authority, at the direction of appellant, and charged to the executor's item in the special accounts. The check was used to pay the judgment, and the real estate firm never repaid it, nor gave any note or receipt for it, nor was the amount of it charged on the books of the bank against the firm, the credit of which was not good at the bank at that time by special orders of the state bank examiner. This $588.55 transaction constitutes the basis for the present action. The de-

fense presents questions of fact upon which there was, as already stated, a conflict of evidence.

After appellant had testified in chief as to the deposit, how he had handled much of it thereafter, and the terms upon which he claimed the deposit was made, the state was permitted, over objections, in the cross-examination to show that, some time prior to the transaction upon which this action rests, he used a part of this same deposit, without any authority from the bank, to pay a note of $1,560 to one P. G. Laude, owing by the firm of S. P. Dixon & Company. The firm gave the bank no evidence of the use of the money, nor was any charge therefor made on the books of the bank against the firm. It is claimed the admission of the evidence violated the general rule that testimony of other crimes committed is not admissible to prove the instant crime. It is to be noticed that the general rule invoked speaks of testimony of other *crimes,* and it is difficult to understand how the use by the appellant of any or all of the deposit for his own personal benefit can be considered as a crime, or at all irregular, upon his theory and main contention that he was authorized by the depositor to use all of the funds as he saw fit—just as if they were his own. The testimony related to the funds of a single deposit made through the appellant with the bank, the books of which, as to this deposit, were kept by appellant, as all the testimony showed. On the other hand, the state contended there was no agreement with the executor by which appellant could do as he pleased with the funds, and that the money used belonged, at the time of its misappropriation, to the Fremont State Bank, and that the state had the right, under a well recognized exception to the general rule, to introduce the testimony objected to, "not for the purpose of prejudicing the jury against appellant by proving the com-

mission of an independent crime, but to throw light on his intentions in the perpetration of the particular transaction constituting the crime charged." The objection was properly overruled. *State v. Pittam,* 32 Wash. 137, 72 Pac. 1042; *State v. Craddick,* 61 Wash. 425, 112 Pac. 491; *State v. Downer,* 68 Wash. 672, 123 Pac. 1073, 43 L. R. A. (N. S.) 774.

In the cross-examination of the executor, appellant attempted to show that he had requested appellant to transfer money from his trust fund account to his personal checking account when the latter was overdrawn. That examination was permitted because it appeared to be material to show just when and how often the bank had paid money to the executor out of his trust fund account. But appellant then attempted to introduce in evidence the account of the executor filed in the matter of the estate in the superior court. Clearly it was an attempt to introduce a side issue in no way helpful in the trial of the present case. If there had been any transfer of the funds from one account to the other, the books and records of the bank should show it. Objection being made to the offer of the executor's account, and the court ascertaining from appellant "It is offered as to the credibility of the witness," the objection was properly sustained.

Certified copies of the complaint, answer of defendant Remsberg, answer of defendant Fremont State Bank, and the judgment in the case of Axelson v. Remsburg and the Fremont State Bank, were admitted in evidence over appellant's objections. This is the judgment already referred to as having been paid to effect the sale of real property belonging to the real estate firm. The documents were offered and allowed only for the purpose of showing the judgment was against Remsberg and not against the bank. Later in the trial the appellant frankly admitted the Axelson

debt was the debt of the real estate firm. There was no error in admitting the proof complained of.

After successful objections to questions put to him, appellant, by his counsel, offered to show that, after appellant received the draft indorsed by the executor in the latter's office, he went into the office of Dr. Winters, on another floor in the same office building, and upon making an appointment for lunch, he thereupon told Dr. Winters, in effect, of his receiving the money from the executor to do with as he saw fit. A proper objection to the offer was sustained by the court, and an examination of the record in this regard shows that what he claimed to have said to the doctor, and the circumstances under which the declaration was made, amounted to nothing more than a reference to a past transaction, lacking in the elements of having emanated instinctively from the act of receiving the deposit for his own bank, so as to make it a part of the *res gestae;* but, on the contrary, it appears to be too clearly open to the suspicion of being self-serving, and was therefore properly excluded.

Subsequent to the taking of the $588.55, the Fremont State Bank failed. At the trial appellant desired to show the condition of the account between that bank and the Seattle National Bank (in which the Fremont bank, by appellant, its cashier, deposited the executor's draft) at the date of the failure of the Fremont bank. An objection to the offer was properly sustained. It was wholly immaterial; for appellant was charged with taking the money of the Fremont State Bank, and he admitted he did use that bank's certified check in the transaction complained of.

There was no error in the instruction given with reference to the inference of intent on the part of appellant the jury was entitled to indulge in upon being

satisfied beyond reasonable doubt that the appellant committed certain enumerated acts.

Lastly, it is urged the court committed error in an instruction to the effect that, when a person makes a deposit in the bank, whether in a general or special account, the money becomes the property of the bank. In this case the instruction as given was correct. In addition, under subdivision 16 of § 2303, Rem. Code, which section gives the rule for construing the terms and provisions of the criminal code, it is provided:

"Any person shall be deemed an 'owner' of any property who has a general or special property in the whole or any part thereof, or lawful possession thereof, either actual or constructive."

Judgment affirmed.

HOLCOMB, C. J., MAIN, MACKINTOSH, and PARKER, JJ., concur.

[No. 15412. Department One. January 19, 1920.]

J. H. GORDON, *Plaintiff and Respondent*, v. W. C. MARBURGER *et al.*, *Defendants*, W. J. AUMILLER, *Intervener and Appellant*.[1]

PARTNERSHIP (38)—AUTHORITY—EXECUTION OF NOTE AND MORTGAGE. One member of a nontrading partnership for the growing of potatoes has no power to borrow money and mortgage the crop belonging to the firm, where he had no duties making it necessary and there was no custom of dealing authorizing it.

SAME (41)—ESTOPPEL TO DENY PARTNERSHIP. The lender of money to the active member of a nontrading partnership for the growing of potatoes cannot claim want of notice of the partnership where he prepared the rent receipt evidencing the lease, which named the dormant partner as a member of the firm.

SAME (20)—FIRM NAME—RECORDING. A nontrading partnership for the growing of potatoes is not within the recording act, Rem.

[1] Reported in 187 Pac. 354.

Code, § 8359, relating to limited partnerships for the transaction of mercantile, mechanical or manufacturing business.

Appeal from a judgment of the superior court for Yakima county, Taylor, J., entered July 18, 1918, in favor of the plaintiff, in an action for equitable relief, tried to the court. Affirmed.

James O. Cull (*E. B. Preble,* of counsel), for appellant.

Snively & Bounds, for respondent.

PARKER, J.—The plaintiff, Gordon, commenced this action in the superior court for Yakima county against the defendant Marburger, seeking an accounting of their partnership affairs and the appointment of a receiver to take charge of their partnership property pending the settlement of their differences. The Growers Service Company was made a defendant because the remaining partnership property, consisting of potatoes, was stored in its warehouse. Arthur Karr was by the court appointed receiver, and by order of the court sold the potatoes stored in the service company's warehouse. The proceeds of the sale, after paying the storage charges and the expenses of the sale, amounted to $525. In the meantime, W. J. Aumiller filed in the receivership proceedings his complaint in intervention, seeking to have his claim, amounting to $300, established as a claim against the potatoes and the proceeds of the sale thereof. The case came on for trial upon the merits as to the accounting controversy between Gordon and Marburger; and also as to the claim of lien made by Aumiller against the potatoes and the proceeds thereof. Judgment was rendered decreeing Gordon to be entitled to the whole of the proceeds of the sale of the potatoes after the payment of the receivership expenses, by

reason of Marburger's appropriation of other property of the partnership. It was also adjudged that the relief prayed for by Aumiller be denied and his complaint in intervention be dismissed. From this disposition of the cause, Aumiller has appealed to this court.

The controlling facts touching Aumiller's claim against the potatoes and the proceeds of the sale thereof may be summarized as follows: On April 10, 1917, Marburger and Gordon entered into a partnership agreement looking to the raising of potatoes, during the crop season of 1917, on a certain ten-acre tract of land in Yakima county owned by Henry Pagel. Marburger was to do the work and superintend it in so far as labor was concerned, while Gordon was to furnish all money necessary for seed, for carrying on the work, for harvesting the potatoes, and for marketing the same. On April 30, Gordon, having furnished money therefor, Marburger paid Pagel $170 for the rent of the land, taking his receipt therefor, which receipt stated that the payment was for rent of the land until March, 1918, specifically described it, and that the payment was made by W. C. Marburger and J. H. Gordon. This receipt was all in typewriting, including its date of April 30, 1917, and was written by Aumiller at the request of Marburger. Gordon furnished sums from time to time from April to January, inclusive, in compliance with the partnership agreement, amounting in the aggregate to $1,370. These several sums seem to have been paid out by Gordon partly direct for labor and supplies and partly to Marburger so he could pay the expenses of the partnership. The evidence is all but conclusive that this $1,370 was considerably more in amount than sufficient to pay all legitimate expenses incident to the production and marketing of the crop. While Gordon

did not have the general superintendence of the farming and the raising of the crop, he visited the land at least once a month during the whole of the season from the planting to the harvesting, and did a small amount of work upon the crop. After the potatoes were harvested, a part of them were disposed of by Marburger and a part stored in the warehouse of the Growers Service Company, in the name of Marburger & Gordon. This was done by Marburger, the receipts therefor being issued in the name of Marburger & Gordon and delivered to him by the Growers Service Company. Marburger never accounted to Gordon for the portion of the potatoes disposed of by him, nor did he account to Aumiller for any portion thereof. It is plain that there was no effort or intention whatever on the part of Gordon to conceal the partnership relation existing between them from the public.

On June 12, 1917, Marburger borrowed from Aumiller $150, executing and delivering to Aumiller his note therefor, payable January 1, 1918. He, at the same time, executed and delivered to Aumiller a chattel mortgage upon the growing crop of potatoes to secure the payment of this note. This was done by Marburger individually in his own name. Thereafter, on November 1, Marburger again borrowed from Aumiller $50, executing his promissory note therefor, payable thirty days after date. No written security was given accompanying this note, but it was orally agreed between them that it be treated as being secured by the chattel mortgage already given. Thereafter, on January 12, 1918, Marburger again borrowed from Aumiller $100, no written evidence of any security accompanying this note, but Marburger promising that he would deliver to Aumiller the receipts issued by the Growers Service Company evidencing the storage of the potatoes in its warehouse. A few days

thereafter Marburger delivered four of such receipts to Aumiller, but without any indorsement thereon of any nature.

No contention is here made against the judgment of the trial court in so far as it awards the proceeds of the sale of the potatoes here involved to Gordon as against Marburger, so we proceed upon the assumption that the fund is the property of Gordon as between those two. It is conceded that the business relations between them was that of a nontrading partnership, and that Marburger's power to contract debts and encumber the partnership property was limited accordingly. In *Snively v. Matheson*, 12 Wash. 88, 40 Pac. 628, 50 Am. St. 877, Judge Dunbar, reviewing the law touching the power of one partner of a nontrading partnership to bind the other partners of the partnership property to the detriment of the other partners, speaking for the court, said:

"The presumption is that one partner has no power to bind the other partners. Hence, before recovery can be obtained upon a contract entered into by one partner in a non-trading partnership against the other partners, it must be affirmatively shown by the party attempting to bind the non-contracting partners, either that the authority to bind was conferred by the articles of copartnership, or that authority had been specially conferred, or that it had been the custom of such partnership to recognize this right to such an extent as would give innocent dealers a right to rely upon the custom."

It was also recognized as the law in that decision that in the doing of acts ordinarily necessary to be done by one partner in the performance of partnership duties assigned to such partner, he can bind the other partners and their interest in the partnership property. It is plain, however, that in this partnership Marburger had no duties to perform in the part-

nership business rendering it at all necessary for him to borrow money to further the partnership interests, nor was there any custom of dealing by either of the partners touching the partnership business in the least suggesting that Marburger was authorized to borrow money for the partnership or incumber its property. The contentions of counsel for Marburger are rested upon the theory that Gordon was a silent or dormant partner and that Aumiller was warranted in dealing with Marburger upon the assumption that he was the sole owner of the potatoes. It is true that Aumiller testified in substance that he had no notice of Gordon's interest in the potatoes until after he had made all of the three loans to Marburger. It is hard to believe that Aumiller was wholly ignorant of Gordon's interest in the potatoes, in view of the fact that Aumiller prepared the rent receipt evidencing the leasing of the land to both Marburger and Gordon for the raising of these potatoes. The chattel mortgage given by Marburger to Aumiller to secure the first loan of $150 described the crop of potatoes as being then growing upon the same land, describing it and referring to it as belonging to Henry Pagel, which mortgage was executed on June 12, only one month and twelve days after Aumiller had prepared the rent receipt for Marburger. Surely this ought to be held to be sufficient to at least put Aumiller upon inquiry as to the probability of Gordon being interested in the potatoes. This significant fact, together with the fact that Gordon made no effort to conceal, and did no act tending to conceal, the existence of the partnership relation between him and Marburger, and the fact that this was purely a nontrading partnership, we think, compels the conclusion that in no event can Aumiller at this time be heard to say, as against the rights of Gordon, that he was led to believe that Marburger

was the sole owner of the potatoes with absolute right to borrow money and secure the payment of the same by incumbering them. Our decisions in *Tilden v. Pederson*, 88 Wash. 254, 152 Pac. 1021, and *Woody v. Wagner*, 89 Wash. 429, 154 Pac. 819, lend support to this conclusion, though we do not cite these decisions as being exactly in point.

Some contention is made in behalf of Aumiller rested upon § 8359, Rem. Code, relating to limited partnerships, our recent decision in *Hanson v. Roesch*, 104 Wash. 257, 176 Pac. 349, and the fact that there were no articles of limited partnership filed in the county auditor's office evidencing the partnership relation of Marburger and Gordon. This is not a partnership such as is mentioned in, and the recording of the articles of which is contemplated by, § 8359, for it is not a partnership "for the transaction of mercantile, mechanical or manufacturing business."

The judgment is affirmed.

HOLCOMB, C. J., MAIN, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 15488. Department One. January 19, 1920.]

ELVIRA B. SAMPLES *et al.*, *Appellants*, v. FRANK KERGAN *et al.*, *Respondents*.[1]

BOUNDARIES (13) — ESTABLISHMENT — LOCATION OF LINES — EVIDENCE—SUFFICIENCY. The reconstruction of a division line fence is sufficiently shown to have been on the original boundary line, where the preponderance of the evidence was that both lines were four feet south of the north wall of a concrete basement of a house still in existence.

APPEAL (411)—REVIEW—FORCE OF EVIDENCE—VIEW OF PREMISES. Undue weight to a view of the premises will not be found where the court was not unduly influenced, and the findings were supported by the preponderance of the evidence.

BOUNDARIES (18) — ESTABLISHMENT — RESURVEY. Rem. Code, §§ 947-949, relating to the restoration of lost boundaries by a resurvey does not control actions to quiet title rested upon adverse possession to a line fence the location of which was established by direct evidence.

SAME — ESTABLISHMENT — ADJUDICATION—DECREE—CERTAINTY. A judgment in an action between adjoining owners to establish the boundary line is sufficiently definite where the decree calls for an east and west line four feet north of the basement wall of defendant's house, in view of the permanency of the monument referred to.

Appeal from a judgment of the superior court for King county, Ronald, J., entered April 11, 1919, upon findings in favor of the defendants, in an action to quiet title, tried to the court. Affirmed.

Charles E. Congleton, for appellants.

Chas. M. Fouts and *C. B. W. Raymond*, for respondents.

PARKER, J. — The plaintiff Elvira B. Samples, and others, as executrixes and executors of the last will and testament of Daniel Samples, deceased, and in their own right, commenced this action in the superior

[1] Reported in 187 Pac. 383.

court for King county, seeking recovery of, and the quieting of title in themselves to, a strip of land about two feet wide lying along the southern boundary line of Samples addition to the city of Seattle, as against the claims of the defendants, Kergan and wife. Trial upon the merits in the superior court sitting without a jury resulted in findings and judgment denying to the plaintiffs the relief prayed for, and quieting title to the strip of land in controversy in the defendants. From this disposition of the cause, the plaintiffs have appealed to this court.

On June 3, 1893, James Galloway and Alice Galloway were the owners, each, of an undivided one-half interest in a tract of land consisting of approximately five acres, being nearly but not quite rectangular in form, bordering upon the easterly shore of Lake Union, in Seattle. On that day they divided the land between themselves, James Galloway taking the south half and Alice Galloway taking the north half, each executing and delivering to the other a deed of conveyance accordingly, wherein the portion taken by each was so described. Immediately upon the making of these mutual conveyances, they built a substantial picket fence upon an east and west line, which they then agreed to be the correct dividing line between their respective halves of the land. Ever since that time James Galloway and his successors in interest, of whom respondents are the last, have been in the open, visible and exclusive possession, adverse to all the world, of all of the land here in controversy lying south of the line of the fence built by the Galloways to establish the dividing line upon the ground between their respective tracts. It may be that in the building of the fence the Galloways did not succeed in placing it upon an east and west line so as to divide the land into two equal halves with exactness, but if not, the

want of exactness in that respect, it would seem, can be accounted for by their seeming attempt to mark the division upon the ground without having an exact survey made thereof by a surveyor; and since the tract so divided was not an exact rectangle in form, but had a broken line on the west boundary along the lake shore, it is at once apparent that the dividing of the tract upon the ground into north and south halves with exactness would be a problem hardly capable of solution without an exact survey. However, it is apparent that the fence so built by the Galloways to mark the dividing line between their respective tracts was, in any event, along its whole course, within approximately two feet of the exact theoretical dividing line between the two halves and, as between themselves, became the established dividing line between their respective halves. Whether or not such established dividing line, its establishment not being a matter of record, continued to be binding upon their successors in interest, it may be here conceded, would depend upon the continual recognition of it and possession by them accordingly. It is, however, all but conclusively proven in this case—indeed it seems to be conceded upon both sides—that possession on the part of James Galloway and all his successors in interest, including respondents, of all land here in controversy lying south of the line upon which the fence was constructed has been continuous, open, visible and adverse to all the world at all times since the construction of the fence, so that, when it is determined as a matter of fact where the line of that fence was and is upon the ground, such determination becomes decisive of this case in so far as the merits are concerned.

There is at present a fence along or near the line in controversy, which is claimed by appellants to be a wholly different fence from the one constructed by

the Galloways. Appellants claim that this fence was constructed by their predecessor in interest several years ago on a line some two feet north of the line of the original Galloway fence, which they claim was then still there, but in such a dilapidated condition that it was more practicable to build a new fence than to repair the old one. This new fence, as appellants claim, was built by one of their predecessors in interest without any idea of its being upon the boundary line of their property, or upon the line of the original Galloway fence, but only as a temporary fence to enclose their pasture lot. Appellants also claim that the remains of the original Galloway fence were, several years ago, entirely removed. It is plain that the present possession of respondents and their predecessors in interest has been up to the present fence at all times since it was constructed as claimed by appellants, whether that fence be in fact a new one located north of the line of the original Galloway fence or merely a reconstruction or repair of the old Galloway fence upon the line of its original location. Respondents claim that the present fence is the original Galloway fence repaired or reconstructed upon the line of its original location, and that their present possession of all the land here in controversy south of it is simply a continuation of the possession of their predecessors in interest.

In April, 1918, appellants caused to be surveyed and platted into lots and blocks what they claim to be the land acquired by them by mesne conveyances from Alice Galloway as the north half of the tract originally owned by the Galloways, and an exact survey of which, as claimed by them, shows their line to be some two feet south of the present fence, which line, they claim, is the one upon which the original Galloway fence was placed and up to which the possession of respondents

and their predecessors in interest extended, and no farther. It is the south line of this survey and plat, known as Samples' Addition, that appellants seek to have established as the line dividing the north and south halves of the original Galloway tract as divided by the Galloways in the year 1893. We have thus related, at what may seem unnecessary length in view of our conclusion, the facts leading up to this controversy, to the end that it may be made plain that the ultimate question determinative of the rights of the parties is simply the question of fact as to where the line of the original Galloway fence was located upon the ground, which is also the line up to which respondents and their predecessors in interest have maintained their possession at all times during the past twenty-five years.

The trial court found, in substance, that the present fence, whether it be a reconstruction or repair of the original Galloway fence, is in fact upon the line of the original location of that fence. The evidence is not free from conflict upon this question, but a careful reading of all the evidence convinces us that it clearly preponderates in support of such finding. Some nine or ten years ago, one of the predecessors in interest of respondents built a substantial dwelling house upon the land now owned by respondents. This house has a basement with walls of solid concrete of a very permanent character, the north wall of which, as we think the evidence shows, is four feet south of the line of the original Galloway fence, which fence, at the time of the construction of the house and basement, was in existence and upon the line of its original location. The north wall of this basement, we think the evidence clearly preponderates in showing, was located four feet south of the line of the Galloway fence, in accordance with actual measurements then made on the ground.

Without reviewing the evidence further, we think it sufficient to say that we think the conclusion cannot be escaped, in the light of this record, that the original Galloway fence line was and is four feet north of the north wall of the basement of respondent's house.

Contention is made that the trial judge erred in treating information acquired by him upon his view of the premises and the disputed line as evidence independent of the testimony heard by him upon the trial, to a greater extent than he was warranted in doing. We think he was not so unduly influenced, in view of the testimony and other evidence given at the trial, and that he regarded such information in no different light, in connection with the evidence admitted on the trial, than he was warranted in doing, under our decisions in *Seattle & Montana R. Co. v. Roeder,* 30 Wash. 244, 70 Pac. 498, 94 Am. St. 864; *Aldredge v. Oregon-Wash. R. & Nav. Co.,* 79 Wash. 349, 140 Pac. 550, and *Elston v. McGlauflin,* 79 Wash. 355, 140 Pac. 396, Ann. Cas. 1916A 255. Without pursuing this inquiry any further, however, we think that, in any event, the evidence given upon the trial compels the conclusion that it clearly preponderates in support of the court's finding as to the location of the Galloway fence, independent of the judge's view of the premises.

Some contention is made rested upon §§ 947-949, Rem. Code, relating to the restoration of lost or uncertain boundaries, and our decision in *Snell v. Stelling,* 83 Wash. 248, 145 Pac. 466, that this case should have been decided upon the theory that it involved only the restoration of a lost or uncertain boundary, and therefore determinable alone by a survey of the exact theoretical line between the north and south half of the original Galloway five-acre tract. This contention, we think, is wholly untenable, in view of the fact that respondents' rights rest, in their last

analysis, upon the adverse possession of themselves and their predecessors in interest, continuing over a period of more than twenty-five years.

Some contention is made that the judgment of the trial court is not sufficiently certain in its terms in determining the location of the line dividing the appellants' and respondents' properties. The judgment touching that question, in so far as it refers to the north line of respondents' land, reads as follows:

"It is therefore ordered, adjudged and decreed by the court, that a fence running east and west practically parallel with and four feet north of the basement wall of defendants' house, and being on the northerly line of the following described premises situated in the county of King and state of Washington:

"Beginning at a point where the easterly line of Minor avenue north intersects the north line of what is known as the J. Galloway tract, thence easterly 120 feet along the said north line of said Galloway tract; . . . is now located upon the line of an old picket fence constructed in the year 1893 by James Galloway and Alice Galloway, his wife, as a division fence between their respective premises."

It seems to us that, in view of the permanency of respondents' house and its concrete basement wall as a monument, the judgment is sufficiently certain in fixing the location of the line between the two ownerships. It is plain that the line is determined to be an east and west line and that it is four feet north of the foundation of respondents' house. The recital in the judgment that it is practically parallel with the north line of the basement wall, we think, is of no consequence except as a recognition of the possibility of the north basement wall not running exactly east and west. The decree, we think, clearly means that the property line runs east and west and is four feet north of the most

northerly point of the north line of the basement wall of respondents' house.

We are quite convinced that the judgment of the trial court must be affirmed.

It is so ordered.

HOLCOMB, C. J., MACKINTOSH, MAIN, and MITCHELL, JJ., concur.

[No. 15508. Department One. January 19, 1920.]

SEYMOUR SHOULTES *et al., Respondents,* v. C. H. QUAST *et al., Appellants.*[1]

DRAINS (13-1)—ESTABLISHMENT—COSTS AND EXPENSES. Under Rem. Code, § 4226-10, authorizing a change of boundaries of a proposed drainage district and a revision of estimated costs, the county commissioners cannot charge the costs of engineer's expense which was not incurred in connection with the plans substantially as recommended or which were incurred in a plan which was a substantial abandonment of that originally planned and petitioned for; but the district finally formed may be charged with such part of the costs as was necessarily incurred in the preparation of the district finally adopted.

SAME (13-1)—COSTS—ATTORNEYS. In the establishment of a drainage district it is proper to allow a reasonable attorney's fee for special attorneys employed whose services were beneficial to the district as finally created.

SAME (13-1)—COSTS—MODIFICATION OF PLAN. Where in the establishment of a drainage district, two ditches were more feasible than one, as originally planned, it is proper to allow the cost of ditch number two.

MANDAMUS (90)—SCOPE OF RELIEF. An application for a writ of mandate does not require the court to either grant or reject it *in toto.*

Cross-appeals from a judgment of the superior court for Snohomish county, Bell, J., entered March 29, 1919, upon findings favorable to the defendants, in mandamus proceedings to compel the striking of certain

[1] Reported in 187 Pac. 356.

costs incurred in establishing a drainage district. Modified.

Thos. A. Stiger, for appellants.

Black & Black, for respondents.

MACKINTOSH, J.—In February, 1916, there was filed with the board of county commissioners of Snohomish county, pursuant to ch. 176, Laws 1913, p. 611 (Rem. Code, § 4226-1 *et seq.*), the petition of Paulson and others asking for the formation of a drainage improvement district to consist of a main ditch about four miles in length with six laterals. The exact boundaries of the lands to come within that district were not given, but it was stated in the petition that the district was intended to benefit about 3,500 acres. The commissioners appointed a special engineer and attorney for the proposed district, and authorized the engineer to go over the lines of the proposed improvement and make a report in writing as to the feasibility of the project. This was done. In the report the engineer shortened the main ditch by about one mile and suggested the omission of certain laterals and recommended others be included, and, referring to the feasibility of the project, pointed out that an exact survey would be necessary before the topography of the land could be ascertained, and when this survey should have been made, other modifications might be required. The commissioners entered an order directing the engineer to make a further survey and prepare the necessary maps, etc., of the proposed district. The project was then designated "Proposed Drainage District Number Five." The engineer proceeded, under the direction of the board, to make such further survey and rendered his estimate of the cost of the district. In this second report the engineer determined that a

large portion of the area which would have been drained by the plan recommended in the first report should not be drained, and in this second report provided for a district of about 2,800 acres, some of which had been included in the original petition and his first report, but about eight hundred acres of new area were included. A plan of the drainage system of the new district was then filed, which consisted of four independent ditches, the first of which was the same as that noticed in the first report except that no laterals were provided. This report also contained, among the estimated costs of the improvement, an item of $1,678.95 for engineering expense. Upon the filing of this report, the commissioners published notice of hearing as required by law, which hearing, after several continuances, was had and the board entered its findings, ordered a district of 1,759 acres, eliminated the 800 acres added by the engineer's second report, and also eliminated the third and fourth ditches named in that report. The district, as finally determined, contained two parallel ditches to be constructed at the same locations where the special engineer had suggested in his second report as ditches one and two, but the sizes of the ditches were somewhat altered.

Some months thereafter the county engineer, pursuant to an order of the board of county commissioners, having made a survey, submitted a plan for ditch number one, which followed the same location proposed by the special engineer, but differed in length, width and depth. This plan was adopted for ditch number one and the district was constructed. The county engineer then determined upon the location of ditch number two and substituted for ditch number two, as proposed, two small ditches, one on each side of the county road, which were to be called ditch number

two. These ditches were shorter than number two, as proposed by the special engineer, and were shallower and, in their combined width, narrower than the ditch originally proposed.

The special engineer's work for the district then ceased, the work being taken over by the county engineer under ch. 130 of the Laws of 1917, p. 517, which was an amendment to the act under which the proceedings had theretofore been conducted. Thereafter appraisers apportioned the amount of costs and expenses on the lands according to the benefits derived, and filed their schedule according to law. The board of county commissioners then gave notice of hearing on the schedule. Prior to that hearing, the respondents applied to the superior court for an alternative writ of mandate. In their application they stated certain irregularities in the proceedings before the board of county commissioners, and alleged that the final order of the board was, in legal effect, a rejection of the original petition, and asked that the fees of the special engineer and the special attorney be disallowed, and that the board of county commissioners be ordered to strike the amount of such fees from the schedule.

The respondents claim that the present district of 1,800 acres should not bear the entire expense of the special survey affecting about 4,000 acres, for the reason that most of the improvements petitioned for originally, or as included in the reports of the special engineer, even if made according to the original petition and reports, would not have benefited the 1,800 acres of the district as created, and also that no portion of the ditches were actually dug according to the plans of the special engineer.

Upon the trial the court struck the special engineering expense, but refused to strike the special attor-

ney's fees and the cost of the two ditches substituted for ditch number two. Both sides have appealed.

Under § 10 of the act of 1913 (Laws 1913, p. 617; Rem. Code, § 4226-10), the board of county commissioners is empowered to change boundaries, to revise estimated costs, to make changes and modifications in engineer's reports, and to reject his work, if necessary, and have the work done by some one else, or to reject the whole proceeding. But this does not give the board the right to allow, as engineer's expense, such expenses as were not incurred in connection with the preparation of plans, specifications, and profiles substantially as recommended in his report, and the district cannot be charged with such expenses as were incurred in a plan which was the substantial abandonment of that originally designed or that favorably reported on, and the district cannot be charged with the expense of making plans, specifications, profiles and estimated costs on ditches situated in locations which were independent of the district as originally petitioned for and favorably reported on.

The district, however, cannot be relieved of such portion of cost as was necessarily incurred in the preparation of the district as it was finally adopted. The entire record is conclusive that the only question properly before the court, in so far as the special engineer's charges are concerned, is as to the apportionment of that expense. It would seem that the special engineer is not entitled to the entire sum of $1,678.95, but the services which he rendered were of value to the district, as finally adopted, in the sum of $900, and an order will be made that this amount be included in the cost of the district.

Passing to the consideration of the special attorney's costs, there is no claim that the amount, *i. e.*, $750, is excessive or unreasonable, the services having extend-

ed over a period of more than two years, and there is no testimony showing that the services were not entirely beneficial to the district as finally created. The court was, therefore, correct in sustaining the allowance of this item by the commissioners.

As to the refusal to strike the item in regard to the cost of ditch number two, the testimony shows that the construction of two ditches was more feasible, economical and serviceable than to have constructed ditch number two according to the original plan. We do not feel called upon, under these circumstances, to interfere with the judgment of the trial court.

The judgment will be affirmed except as indicated in the foregoing in regard to the special engineer's costs. An application for a writ of mandate does not compel this court to either grant or reject it *in toto*. Such is the holding in *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207; *State ex rel. Barto v. Board of Drainage Com'rs*, 46 Wash. 474, 90 Pac. 660; *State ex rel. Wolfe v. Parmenter*, 50 Wash. 164, 96 Pac. 1047, 19 L. R. A. (N. S.) 707; *State ex rel. Maltbie v. Will*, 54 Wash. 453, 103 Pac. 479, 104 Pac. 797.

HOLCOMB, C. J., PARKER, MAIN, and MITCHELL, JJ., concur.

[No. 15520. Department Two. January 19, 1920.]

HUGH F. WALKER *et al.*, *Appellants*, v. M. E. CALLENDAR *et al.*, *Respondents*.[1]

FRAUD (4)—MISREPRESENTATIONS—MATTERS OF FACT OR OPINION. In an action for the fraud of a real estate agent in pointing out the wrong land to a prospective purchaser, the agent's statements that he was satisfied that it was the land in question were not, as a matter of law, mere expressions of opinion, where the agent claimed to have such a description and knowledge of the land as to enable him to identify it, although he had never before seen it.

PRINCIPAL AND AGENT (9)—EVIDENCE OF AGENCY—SUFFICIENCY. In an action against the owner of land for fraud of the agent in pointing out the wrong land, the evidence is insufficient to show that he was agent for the purpose of pointing out the land where it merely appears that he was the broker authorized to make the trade, and that the owner suggested that plaintiff go and see the land, and that the two had had considerable other business between themselves, and the owner was to pay part of the commission.

SAME (41)—AUTHORITY OF AGENT—DECLARATIONS OF AGENT. The authority of a real estate broker to show land belonging to his principal cannot be shown by declarations of the agent.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 10, 1919, upon granting a nonsuit, dismissing an action for damages for fraud. Affirmed in part and reversed in part.

Poe & Falknor and *Chas. R. Lewis*, for appellants.

A. B. Crowl and *Peters & Powell*, for respondents.

BRIDGES, J. — In December, 1917, the appellants, Walker and wife, were the owners of a forty-acre tract of farm land located in King county, near the town of Enumclaw, and the respondents Callendar and wife were the owners of a tract of logged-off land located in Mason county, containing approximately 240 acres. During that month Callendar and Walker made a

[1] Reported in 187 Pac. 380.

trade and exchanged deeds. As a part of the trade, Callendar assumed and agreed to pay a mortgage which was on the Walker land, and, in addition thereto, to pay a bonus of some $300. The respondent H. B. Adams was a real estate agent in Seattle, and negotiated this deal. The appellants charge that, before the deal was consummated, Adams, who, they allege, was Callendar's agent, took Walker to Mason county for the purpose of showing him the Callendar land, and that while there showed him certain land which Adams represented was the Callendar land, and that Walker relied upon such representations; that, as a matter of fact, the land shown him was not the land owned by the Callendars, and was not the land subsequently deeded by Callendar to him, and that the land actually deeded was of very much less value than that which was pointed out as the land to be deeded, and that the appellants have been thereby damaged. At the close of plaintiffs' case, the court granted a nonsuit, and thereafter entered judgment dismissing the action, and it is from this judgment the appeal is taken.

There are two principal questions involved in this case: (1) Did Adams so point out the Mason county land as to authorize the appellants to rely upon his representations that it was the land owned by the Callendars; and (2), if the above question be answered favorably to the appellants, then was Adams the agent of the Callendars for the purpose of showing their land to the appellants?

The additional facts are as follows: Callendar testified that, some time prior to the trade involved in this action, the appellants listed their farm with Adams for sale; that Adams spoke to him about the land and asked him if he would not buy or trade for it. Callendar told him he had 240 acres of logged-off land in Mason county which he might trade for the farm, and

suggested that Walker go and see the land and make him, Callendar, a proposition. Some time thereafter Adams returned to Callendar and informed him that Walker was willing to go and look at the Mason county land. At that time Callendar gave Adams a tax receipt showing the description of this land. Some days after this conversation, Adams told Callender that Walker had been to look at the Mason county land and that he would make a trade, providing Callendar would assume the indebtedness on the Walker farm and pay $600 besides. Callendar refused to pay $600, but finally agreed to pay a bonus of $250. Thereafter some change was made whereby the bonus was made a little larger and Callendar agreed to pay a part of Adams' commission. Walker, on behalf of the appellants, testified that, just before he and Adams went to look at the Callendar land, Adams told him that he had had a talk with Callendar and that the latter had told him that he could not go to the land, but that Adams should take Walker and show him the property; that next day he and Adams went to Mason county for the purpose of looking at the land. Adams agreed to pay Walker's expenses to Shelton if the deal were made. When they reached Shelton, Adams hired an automobile, with driver, to take them to the land. He gave a description of the land to the driver, who was fairly well acquainted with the different sections of land in that neighborhood. Adams told the driver that the land had a shack on it and a small amount of clearing. After driving for some distance, the automobile was stopped and the driver stated that, so far as he could tell, they were on the land mentioned by Adams; that, after Adams had looked around a little, he said to Walker: "Well, I am satisfied this is the property. This is the property all right." They then

walked over a considerable portion of the property and Walker concluded there were some four million feet of good timber and that the soil was good; Walker further testified that there were on the land two small shacks, a considerable clearing and a stump puller; that, after the parties had gone back to Seattle, he again questioned Adams as to whether or not he was sure they had been on the Callendar land, and was assured by Adams that they had been. On the trip to see the land, Adams told Walker that he had never before seen the property, and Walker understood that Adams wanted to get some one to point it out to him. Walker understood from Adams that Callendar had never seen his land. While they were on the land, Adams pointed out to Walker what he claimed to be the various lines of the Callendar land. It appears that, before they went on the land, Adams had given Walker to understand that there was a small shack on the land and some clearing and that a part of it was logged off, and that there was probably some timber left on it. Adams told him that he knew they were looking at the Callendar land because he recognized it from the description which Callendar had given him. It further appears that there was no shack on the land actually owned by Callendar. Walker further testified that there was an agreement whereby he, Walker, was to pay one-half of Adams' commission, and he understood Callendar was to pay the remainder.

In determining whether the nonsuit was properly granted, this court must look at appellants' testimony in that light which is most favorable to them. The respondents contend that, even under this rule, it must be held that appellant H. F. Walker had as much knowledge concerning the Callendar land as Adams had; that he could, as well as the latter, locate the land,

and that he knew that Adams could not and did not pretend to locate the land with any degree of accuracy, and that, consequently, any expressions of Adams to Walker to the effect that the latter had been shown the land owned by Callendar were nothing more than expressions of opinion upon which the appellants had no right to rely. We cannot follow respondents in this regard. There is, at least, some testimony which tends to show that Adams claimed to have such a description and knowledge of the land as would enable him to identify it and that he led Walker to believe that he could accurately point it out. We cannot, therefore, hold, as a matter of law, that Adams' assertions were merely expressions of opinions, or that Walker was not entitled to rely on them. They were assertions of fact about which Adams claimed to have information of which Walker was ignorant. In the case of *Grant v. Huschke,* 74 Wash. 257, 133 Pac. 447, this court stated the rule as follows:

"Representations, as of his own knowledge, of material and inducing facts susceptible of knowledge, made by a vendor in ignorance of the facts, but with the knowledge that the vendee is relying upon the representations as true and under circumstances reasonably excusing the vendee from investigating for himself, are actionable on the part of a vendee so relying to his injury."

Again, in the case of *Lawson v. Burnham,* 38 Wash. 422, 80 Pac. 559, 107 Am. St. 880, this court said:

"The prevailing doctrine is that, if a person states as true, as of his own knowledge, material facts susceptible of knowledge, to one who relies and acts thereon to his injury, he cannot defeat recovery by showing that he did not know that his representations were false, or that he believed them to be true. The falsity and fraud consists in representing that to be true which he did not know to be true."

In the case of *Bradford v. Adams,* 73 Wash. 17, 131 Pac. 449, this court said:

"From numerous decisions of this court, it has become the settled doctrine that the vendor, when he undertakes to point out lands or boundaries to a purchaser, must do so correctly. He has no right to make a mistake except under penalty of having the contract rescinded or responding in damages."

Respondents, however, cite and greatly rely upon the case of *Stewart v. Larkin,* 74 Wash. 681, 134 Pac. 186, L. R. A. 1916B 1069. We think, however, that the law of that case is inapplicable to the facts of the case at bar. There it was sought to rescind and recover the purchase price on the ground that the landowner, in order to induce the purchaser to buy, falsely represented that the land would be irrigable by means of a canal or ditch as part of a certain irrigation project. None of the parties in that case knew anything about the proposed ditch except by hearsay. The landowner did not pretend to have any control over the location of the ditch, and the purchaser knew as much as the landowner about these matters. The fundamental difference between that case and this seems to us at once manifest. It is that the parties in that case were on an equality, while here they were not.

The conclusion to which we have come will require a reversal of the case as to respondent Adams, and also as to respondents Callendar and wife, unless the testimony fails to show that Adams was authorized to, and did, represent Callendar and wife as their agent in pointing out to appellant H. F. Walker the land in question. The testimony tends to show that Callendar had made Adams his agent for the purpose of making the trade in question; that he had given Adams a tax receipt showing a description of the land; whether the tax receipt was given by Callendar on his own initiative

or at the request of Adams, the record fails to disclose; that Callendar had told Adams that Walker had best go see the land and make a proposition; that Callendar had agreed to pay Adams a part of the commission for making the trade; that the two respondents had had considerable other business between themselves; that Adams had told Walker that Callender had told him (Adams) to show Walker the land and had given him (Adams) a somewhat particular description of the land whereby the same could be identified. This is all the testimony tending to show the agency. It is insufficient. The fact that Callendar made Adams his agent to make the trade and gave him a tax receipt showing the legal description of the land, and that Callendar and Adams had considerable other business together, but entirely distinct from this deal, would not make Adams Callendar's agent to show Walker the Mason county land. He was the agent only for the purpose of making the trade. Walker's testimony to the effect that Adams had told him that Callendar had authorized him (Adams) to show the land and that Callendar had given him (Adams) descriptions whereby the land could be identified, will not aid appellant. While that testimony may have been admissible as against Adams, it was not admissible as against Callendar. Agency cannot be proved in that way. This exact question was decided by this court in the case of *Woodworth v. School Dist. No. 2*, 92 Wash. 456, 159 Pac. 757. In that case one of the officers of the school district, over objections, was permitted to testify to certain declarations made to him by one Jansson, agent for the plaintiff, to the effect that he was authorized to receive and receipt for moneys on behalf of the plaintiff, his principal. Judge Main, speaking for the court, said:

"In other words, the declarations of Jansson as to the scope of his power and authority were received. This was error. Neither the fact of agency, nor the scope of the agent's authority, can be established by the declarations of the alleged agent in the absence of the principal. The fact that the agency may be admitted for one purpose does not make the admissions and declarations of the agent, which are not known to or acquiesced in by the principal, admissible for the purpose of establishing the scope or extent of his authority."

Many authorities are cited in that opinion in support of the views of the court.

In the case of *Gregory v. Loose,* 19 Wash. 599, 54 Pac. 33, the court said:

"It was also error, we think, to permit certain witnesses to testify as to what this supposed agent told them that appellant said or had concluded to do, with respect to this logging road. This was clearly hearsay testimony, and hence not admissible. Nor were the acts and declarations of Mathews competent evidence in proof of agency."

We therefore conclude that there was no proof that Adams was Callendar's agent for the purpose of showing Walker these lands, and that Callendar was not responsible for any false or misrepresentation made by Adams concerning the land.

The judgment is affirmed as to the respondents Callendar and wife and reversed as to respondent Adams.

HOLCOMB, C. J., FULLERTON, MOUNT, and MACKINTOSH, JJ., concur.

[No. 15565. Department Two. January 19, 1920.]

HILDA RASI, *Respondent*, v. HOWARD MANUFACTURING COMPANY, *Appellant*.[1]

MASTER AND SERVANT (20-1)—WORKMEN'S COMPENSATION ACT—PERSONS PROTECTED—UNLAWFUL EMPLOYMENT OF MINORS—STATUTES. A girl under sixteen years of age employed in a factory without any permit in violation of Rem. Code, § 2447, is nevertheless a "workman" within the provisions of the industrial insurance act, withdrawing all civil remedies for personal injuries to workmen in extra-hazardous employments; especially in view of Rem. Code, § 6604-7, recognizing that a child less than the maximum age is a workman within the meaning of the act.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 23, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

R. D. Hill and *S. H. Kelleran*, for appellant.

James B. Murphy, for respondent.

MOUNT, J.—This appeal is from a judgment in favor of the plaintiff in an action for personal injuries. The defendant has appealed.

The principal and only question necessary for us to consider is whether the action may be sustained.

The facts are as follows: The appellant is a corporation engaged in business in Seattle in the manufacture of woodenware. It has various power-driven machines which are used in its factory. One of these machines is a sanding machine for smoothing flat boards. The respondent was employed as an off-bearer upon this sanding machine. In some manner her left hand was caught between the rolls of this machine and she lost the four fingers of her left hand. Her injury occurred on July 3, 1918, when she had worked at this

[1] Reported in 187 Pac. 327.

machine but a short time. At the time of her employment, she was past fifteen years of age, but not sixteen. She had no permit to work from a superior court judge of the county where she lived. The business of the appellant was within the terms of the workmen's compensation act, and appellant made regular returns and had complied with all the requirements of that law. After respondent's injury, she brought this action at common law to recover on account of the alleged negligence. The appellant insists that the sole remedy of respondent is to be found in the terms of the workmen's compensation act and that she has no redress by statute against her employer. This position must be sustained. The first section (Rem. Code, § 6604-1) of that act provides as follows:

"The common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage-worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state

over such causes are hereby abolished, except as in this act provided."

In *Ross v. Erickson Construction Co.*, 89 Wash. 634, 155 Pac. 153, L. R. A. 1916F 319, after quoting from this section, we said:

"The legislature undertook to withdraw 'all phases of the premises from private controversy,' and provide 'sure and certain relief for workmen,' and to that end abolished 'all civil actions and civil causes of action for such personal injuries,' and abolished all jurisdiction of the courts over such cases, except as in the act provided. . . .

"Clearly the purpose of the act was to end all litigation growing out of, incident to, or resulting from the primary injury, and in lieu thereof, give to the workman one recovery in the way of certain compensation, and to make the charge upon the contributing industries alone. That purpose is made reasonably clear by reference to the act."

See, also, *Stertz v. Industrial Insurance Commission*, 91 Wash. 588, 158 Pac. 256, Ann. Cas. 1918B 354, and cases there cited.

If the respondent was a workman within the meaning of this act, there can be no doubt that her sole redress must be found in the terms of the act. If she had been of the age of sixteen years, there could be no reasonable contention that she did not come within the terms of the act. The statute, at § 2447, Rem. Code, provides:

"Every person who shall employ, and every parent, guardian or other person having the care, custody or control of such child, who shall permit to be employed, by another, any male child under the age of fourteen years or any female child under the age of sixteen years at any labor whatever, in or in connection with any store, shop, factory, mine or any inside employment not connected with farm or house work, without the written permit thereto of a judge of a superior

court of the county wherein such child may live, shall be guilty of a misdemeanor."

Respondent's position seems to be that, because it was unlawful for appellant to employ the child under the age of sixteen years, she was not confined for redress to the terms of the workmen's compensation act. Counsel rely principally upon the case of *Hillestad v. Industrial Insurance Commission,* 80 Wash. 426, 141 Pac. 913, Ann. Cas. 1916B 789, 6 N. C. C. A. 763. That was a case where a boy under the age of fourteen years was drowned while floating some logs at his father's mill, and where the father sought to recover under the workmen's compensation act. We held in that case: First, that there was no employment of the boy and he was, therefore, not a workman; and second, conceding that the boy was employed by the father, the employment was wrongful and the father could not profit by his own wrong. The question whether the boy might have recovered under the act if he had been injured instead of drowned was not before us. We are satisfied that case is not authority for the position of the respondent here. Section 2447, Rem. Code, hereinbefore quoted, makes it a misdemeanor for an employer to employ "any male child under the age of fourteen years or any female child under the age of sixteen years at any labor" in any factory without the written permit of a judge of a superior court of the county wherein such child may live. This statute does not make it unlawful for a child under the prohibited age to work, and imposes no penalty upon the child when it does work. It follows that the child neither gains nor loses any rights by such employment, even though the employer may be penalized. Section 6604-9 of the workmen's compensation act provides:

"If any workman shall be injured . . . or be, at the time of the injury, of less than the maximum age

prescribed by law for the employment of a minor in the occupation in which he shall be engaged when injured, the employer shall, within ten days after demand therefor by the department, pay into the accident fund, in addition to the same [sum] required by section 6604-4 to be paid:

"(a) In case the consequent payment to the workman out of the accident fund be a lump sum, a sum equal to fifty per cent of that amount.

"(b) In case the consequent payment to the workman be payable in monthly payments, a sum equal to fifty per cent of the lump value of such monthly payment, estimated in accordance with the rule stated in section 6604-7."

This section plainly recognizes that a child less than the maximum age for the employment of a minor is a workman within the meaning of that act. It follows that, whether the child is employed either lawfully or unlawfully, such child is entitled to all the privileges of the workmen's compensation act and must seek its remedies under the terms of that act.

The judgment must therefore be reversed and the action dismissed.

HOLCOMB, C. J., MITCHELL, FULLERTON, and BRIDGES, JJ., concur.

[No. 15601. Department One. January 19, 1920.]

GEORGE A. SMITH *et al., Respondents,* v. LAMBERT TRANSFER COMPANY *et al., Appellants.*[1]

DAMAGES (35-1)—LIQUIDATED DAMAGES AND PENALTIES—PROPORTION OF SUM STIPULATED. Under a fifteen-year lease calling for rent in the total sum of $76,500, the sum of $5,000, paid on the last installments and stipulated as liquidated damages in case of forfeiture of the lease, is not so disproportionate to the amount involved as to amount to a penalty.

SAME (38)—LIQUIDATED DAMAGES—LIMIT OF RECOVERY. Under a lease providing for stipulated damages in the sum of $5,000 in case of forfeiture for breach of conditions, the lessor cannot recover any sum in addition on account of the nonpayment of taxes which was a special damage arising from a breach of one of the covenants of the lease.

Appeal from a judgment of the superior court for King county, French, J., entered February 18, 1919, upon findings in favor of the plaintiffs, in an action on contract, tried to the court. Modified.

Reeves Aylmore, Jr., Corwin S. Shank, and *H. C. Belt,* for appellants.

Tucker & Hyland, for respondents.

MACKINTOSH, J.—On January 30, 1913, the respondents leased to the appellants certain premises for a period of fifteen years, the lease containing the following provision:

"The lessee has paid the lessors five thousand dollars mentioned in the memoranda of agreement entered into between the lessees and the lessors on the 15th day of November, 1912. This payment is made in payment of the last several monthly installments of rental accruing under this lease, which monthly installments aggregate five thousand dollars, and as security to said lessors for the faithful performance of

[1] Reported in 187 Pac. 362.

the covenants and agreements on the part of the lessee herein. In case of the nonpayment of the rent payable at any of the times herein specified or in default of any of the covenants herein contained, the lessors may cancel this lease in the manner provided by law, and said payment of five thousand dollars shall be forfeited as liquidated damages by the lessors. The lessors covenant and agree to pay the lessees, semi-annually, seven per cent interest for the first five years and thereafter six per cent upon said five thousand dollars, and on January 1 and July 1 of each year the interest then accrued upon said five thousand dollars, as herein specified, shall be credited to the lessees upon the monthly installment of rental due by the lessees to the lessors on said respective dates hereunder, and only the balance of said monthly installments after deducting the credit for interest shall be paid by the lessors."

The appellants, after being in possession some time, failed to meet the monthly payments of rent promptly and failed to pay the taxes as provided for in the lease, and allowed the same to become delinquent. In 1918, the respondents paid the amount of the delinquent taxes and redeemed the certificate which had been issued therefor, and in August, 1918, the appellants vacated the premises and the respondents began this action for the purpose of cancelling the lease, declaring a forfeiture of, and providing for the retention of, the $5,000 deposit as liquidated damages, and also asked judgment for $2,145.93, the amount of the delinquent taxes which they were compelled to pay. The judgment of the lower court resulted in favor of the respondents in the sum of $2,145.93, together with the forfeiture of the $5,000 as liquidated damages.

Two questions appear in this case: First, as to whether the provision in regard to the $5,000 is a provision creating a penalty or creating liquidated damages; and second, if the provision is one creating liqui-

dated damages, whether the respondents are entitled, in addition to the amount of $5,000, to a judgment for the amount which they have expended in the payment of delinquent taxes.

The question as to whether a stipulation in regard to the payment of a fixed sum to a landlord to be used in compensation for breach of the lease is held by the landlord as a penalty or as liquidated damages is one of no little difficulty, for it calls upon the court to determine what was the intention of the parties to the lease; and different courts, in interpreting the intention of the parties, have arrived at what appear to be irreconcilable conclusions, but all the courts seem to agree that the mere language that the parties may have used is not of controlling effect, but is to be given the legal force their intention indicates. Some courts have held that express stipulations for "penalties" were really stipulations for "liquidated damages;" and *vice versa,* "liquidated damages" have often been called "penalties." Such courts hold that the parties may not agree absolutely upon a large price for the breach of some immaterial or trivial part of their contract, it being said that such an agreement is against the policy of the law. The test of the validity of such contract provisions as the one before us has been determined by this court to be that of the adequacy and justice of the amount stipulated. The nature of the agreement, for a possible breach of which the contract provides, is a determining factor in establishing the intent of the parties in providing for a possible violation. Some of the particular things provided for in the contract may be of less importance than others and their breach may not result in serious damage, but this is no more an absolute guide to the parties' intention than the use by them of the words "penalty" or "liquidated damages." That intention is to be deter-

mined by whether, in view of the actual breach complained of, the amount provided for in the contract can fairly be regarded as a penalty or as a fair measure of the real damage in the minds of the parties most capable of determining the possible effect of the breach of the contract.

"Generally speaking, it may be said, that when the damages arising from the breach of the contract which the obligation is given to secure, are uncertain in their nature and not readily susceptible of proof by the ordinary rules of evidence, and are not so disproportionate to the probable damages suffered as to appear unconscionable, and it is reasonably clear from the whole agreement that it is the intention of the parties to provide for liquidated damages and not a penalty, such a stipulation will be held to be one for liquidated damages." *Madler v. Silverstone,* 55 Wash. 159, 104 Pac. 165.

In a case in which a provision for the deposit of $1,200 for the breach of a lease, the total rent of which amounted to $36,000, was before us, this court said:

"The fallacy of respondent's argument lies in her assumption that the $1,200 was advanced as security only. She ignores the probable contingency that a loss of the tenancy might cause damages to appellants difficult of ascertainment, whether termination of the tenancy resulted from a wrongful and voluntary surrender by respondent or from respondent's default in payment of rent, coupled with appellants' election to then terminate the lease. By exercising their election to terminate the lease, appellants did not waive their right to retain the liquidated damages. The default which caused such termination originated with respondent." *Barrett v. Monro,* 69 Wash. 229, 124 Pac. 369, 40 L. R. A. (N. S.) 763.

In the case before us, the penalty was in the sum of $5,000, and the total amount of the rent provided for in the lease amounted to $76,500; so, in this case, we

cannot say that the amount is disproportionate to the total amount involved.

In *Munson v. Baldwin,* 88 Wash. 379, 153 Pac. 338, the sum of $1,500 as liquidated damages for breach of a lease, where the monthly rent was $370 and the lease had three years to run, was held not to be unreasonable. The parties agreed upon the liquidated damages because the exact measure could not easily be ascertained. That sum was not unreasonable in view of the value of the lease as a whole.

This court has had before it many times the question of whether stipulations in agreements were to be considered as penalties or as part of the consideration or as liquidated damages, and has held in the following cases that the stipulations were for penalties: *Krutz v. Robbins,* 12 Wash. 7, 40 Pac. 415, 50 Am. St. 871, 28 L. R. A. 676; *Johnson v. Cook,* 24 Wash. 474, 64 Pac. 729; *McDaniels v. Gowey,* 30 Wash. 412, 71 Pac. 12; *Stoner v. Shultz,* 69 Wash. 687, 125 Pac. 1026; *Miller v. Moulton,* 77 Wash. 325, 137 Pac. 491. In the case of *Dutton v. Christie,* 63 Wash. 372, 115 Pac. 856, it was held that the payment made was part of the consideration for the contract. In the following cases the stipulations were held to be for liquidated damages: *Reichenbach v. Sage,* 13 Wash. 364, 43 Pac. 354, 52 Am. St. 51; *Everett Land Co. v. Maney,* 16 Wash. 552, 48 Pac. 243; *Jennings v. McCormick,* 25 Wash. 427, 65 Pac. 764; *American Copper, B. & I. Works v. Galland-Burke B. & M. Co.,* 30 Wash. 178, 70 Pac. 236; *Drumheller v. American Surety Co.,* 30 Wash. 530, 71 Pac. 25; *Canady v. Knox,* 43 Wash. 567, 86 Pac. 930; *Madler v. Silverstone,* 55 Wash. 159, 104 Pac. 165; *Yatsuyanagi v. Shimamura,* 69 Wash. 42, 106 Pac. 503; *Herberger v. Orr Co.,* 62 Wash. 526, 114 Pac. 178; *Barrett v. Monro,* 69 Wash. 229, 124 Pac. 369, 40 L. R. A. (N. S.) 763; *Grand Union Laundry Co. v.*

Carney, 88 Wash. 327, 153 Pac. 5; *Munson v. Baldwin,* 88 Wash. 379, 153 Pac. 338.

Under these decisions, it must be held that the intention of the parties in the case before us was to provide for liquidated damages.

Having determined that the contract provision in question was for liquidated damages, we come to the determination of the second question, as to whether respondents are entitled to retain the $5,000 in addition to recovering the amount which they paid in taxes, which was a special damage arising from the breach of one of the covenants of the lease. The general rule, as stated in 8 R. C. L. 358, is that, in contracts providing for liquidated damages, the amounts therein named measure the damages in case of a breach, and that recovery must be for amounts no other or greater than those stipulated, though the actual damage may be greater or less. See, also, 17 C. J. 966. Without discussion, this court, in *Go Fun v. Fidalgo Island Canning Co.,* 37 Wash. 238, 79 Pac. 797, and *West Coast Manufacturer's Agency v. Oregon Condensed Milk Co.,* 54 Wash. 247, 103 Pac. 4, has committed itself to the view that liquidated damages establish the amount recoverable for the breach of the contract. If the amount agreed upon is liquidated damages, there can be no additional recovery for special items of damages arising out of breach of covenants for which liquidated damages were provided. The fact that the actual damage may be in excess of or less than the amount agreed upon as liquidated is a matter with which the court could not be concerned, for when it has been determined that that amount is not disproportionate to the amount of the actual damage which might occur, and the possibility was remote at the time of entering into the contract of accurately ascertaining the amount of the prospective damages,

and the court having found the intent of the parties to be that they have agreed upon a definite sum which was to be retained by one of the parties as full compensation in the event of the breach, proof of special items of damage for the breach of any of the conditions covered by the stipulated amount is inadmissible. This rule has been followed in a great number of cases, among which might be cited: *McCurry v. Gibson,* 108 Ala. 451, 18 South. 806, 54 Am. St. 177; *Morris v. Wilson, Sons & Co.,* 114 Fed. 74; *Millen v. Gulesian,* 229 Mass. 27, 118 N. E. 267; *Jackson v. Hunt,* 76 Vt. 284, 56 Atl. 1010; *Board of Commerce of Ann Arbor v. Security Trust Co.,* 225 Fed. 454; *Dean v. Connecticut Tobacco Corporation,* 88 Conn. 619, 92 Atl. 408; *Smith v. Newell,* 37 Fla. 147, 20 South. 249; *Jobst v. Hayden Bros.,* 88 Neb. 469, 129 N. W. 992; *Yoder v. Strong,* 227 Pa. 432, 76 Atl. 176; *Nelson v. Butler,* 190 S. W. (Tex. Civ. App.) 811; *Morrison v. Ashburn,* 21 S. W. (Tex. Civ. App.) 993; *Stillwell v. Temple,* 28 Mo. 156; *Rosenquist v. Canary,* 20 Misc. Rep. 40, 45 N. Y. Supp. 342; *Stone, Sand & Gravel Co. v. United States,* 234 U. S. 270.

It would therefore appear that the lower court was in error in including in its judgment the sum of $2,145.93, which was a special damage to the respondents for breach of the covenant to pay the taxes. The judgment of the lower court will be modified by excluding that sum, and in other respects affirmed.

HOLCOMB, C. J., MITCHELL, PARKER, and MAIN, JJ., concur.

[No. 15416. Department One. January 20, 1920.]

GLEASON COMPANY, *Respondent*, v. N. M. CARMAN, *Appellant*.[1]

EVIDENCE (169)—PAROL EVIDENCE TO VARY WRITING—COMPLETENESS OF WRITING. A written offer to manufacture for defendant's shop special design lighting fixtures as per plans submitted, which plaintiff's complaint showed were unusual and for defendant's special use, is so incomplete as to admit proof of a special warranty of fitness and efficiency.

SALES (103)—WARRANTIES—INSPECTION, EXAMINATION OR TEST. Upon an issue as to whether there was a collateral oral warranty that articles manufactured for defendant's special purpose would meet the requirements, the fact that plaintiff installed one of the articles to ascertain if it would meet the requirements must be taken as an admission of an outstanding warranty as to its efficiency.

SALES (108)—IMPLIED WARRANTIES—FITNESS FOR PURPOSE INTENDED. Upon an executory sale by a manufacturer of articles to be made for a special purpose, there is an implied warranty of fitness for the purpose intended.

SALES (127)—ACTIONS FOR PRICE—DEFENSES—FRAUDULENT REPRESENTATIONS. It is a good defense to an action for the price of special electric light fixtures manufactured for a special use in the defendant's shop, that defendant was induced to enter into the contract by false representations as to the efficiency of the articles, being without knowledge of the subject-matter, even if the seller did not know the statements were false.

Appeal from a judgment of the superior court for King county, Jurey, J., entered February 1, 1919, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Reversed.

McClure & McClure and *Walter S. Osborn*, for appellant.

Howard G. Cosgrove and *Ernest B. Herald*, for respondent.

MITCHELL, J.—This action was brought by plaintiff to recover four hundred dollars, the alleged value of

[1] Reported in 187 Pac. 329.

certain lighting fixtures manufactured by it for the defendant, under a written contract set out in the complaint as follows:

"June 2, 1917.

"Mrs. N. M. Carman,
"Cheasty Bldg., Seattle.

"Dear Madam: We propose to furnish and install eight (8) special design crystal fixtures as per designs submitted, for the Carman shop; our compensation to be the sum of four hundred dollars ($400) net, and the old fixtures now there to be replaced by the new ones.

"Very truly yours,
"H. E. Gleason Company,
"Per H. H. Bailey.

"Accepted: N. M. Carman,
"June 2, 1917."

The complaint further alleged that, after the fixtures were manufactured by plaintiff, it notified defendant it was ready to install them, but she refused to allow them to be installed, refused to accept or pay for them, and that they were valueless to plaintiff as fixtures or material. In her answer, after appropriate denials, but admitting the writing, defendant interposed two affirmative defenses, as follows:

In the first defense she alleged, in substance, that she is engaged in business in Seattle, Washington, as a manufacturer and dealer in women's attire, maintaining a large storeroom, expensively and elaborately equipped for the purpose of displaying the goods manufactured and sold by her, and that it is necessary therefor that her salesrooms have an abundance of soft and pleasing light. That plaintiff, by its agent, one Bailey, submitted to her a design for electric lighting, and represented to her that fixtures constructed according to that design would furnish a soft yet illuminating electric light that would bring out the hues and tints in the goods dealt in by her, illuminate the rooms

and furnish a light not harsh, glaring or injurious to the eyesight of her employees and customers. That, relying solely upon the representations made by Bailey and believing them to be true, she signed and delivered the writing set out in the complaint. That thereafter plaintiff installed in her store a sample light, represented by plaintiff to have been constructed according to the design submitted to her and referred to in the writing, for the purpose of testing and determining if it would comply with the representations made by plaintiff through its agent for the purpose of inducing her to sign the writing in question. That the sample light so furnished and tested did not give a soft and illuminating light, but on the contrary the light was glaring, harsh and offensive to the eye, injurious to the eyesight of her employees and customers, and if the lights were used, would be greatly injurious to her employees' health and would make her goods appear displeasing to the eye, and result in great injury to her business. That, because of such defect, she refused to accept the sample lamp, or any of them so constructed. That all the representations of the agent were false and untrue; that it was impossible to use the lights in the business as conducted by her; and that, because the representations were false and untrue, the writing signed by her is not binding.

The second affirmative defense is of a similar kind, but somewhat extended. In effect, it repeated the allegations of the first affirmative defense, and continued by averring that she had no knowledge whatsoever of electricity or electric lighting, or of the method or means necessary to be adopted for the purpose of producing the quantity or quality of illumination required in her business, and that she relied entirely upon the knowledge and experience represented to be possessed by plaintiff's agent for such purposes and the mode

and means to be adopted to accomplish her purpose, and so relying, she signed the writing set out in the complaint. That the electric lamps manufactured according to the design would not give such light as she required in her business, but would give a harsh, glaring light, injurious to the eyesight of her employees and customers and harmful to the appearance of her merchandise and wholly unsuitable for use in her business.

To each of the affirmative defenses plaintiff filed and presented a motion to strike it as being "incompetent, irrelevant and immaterial." The motion was granted as to each defense. The case was tried to the court without a jury, upon the complaint and denials. There were findings and conclusions in favor of plaintiff, upon which judgment was entered for the full amount sued for. The defendant has appealed, and assigns as error the order striking the affirmative defenses.

Why the affirmative matter in the answer was forced out of the action by the motion to strike is not made clear. Indeed, because counsel on both sides, in presenting the case in this court, argued the matter as if the defenses were tested by a general demurrer, we shall so consider it in our disposition of the case.

There are only two principal contentions made here.

First, counsel for appellant argue that the written contract is not conclusive against an oral warranty, and that, under the affirmative defenses, appellant is entitled to show there was a warranty that she relied on and that there was a breach of the warranty. Counsel for respondent argue to the contrary.

Second, counsel for appellant contend the affirmative defenses allege there were false representations made by respondent's agent as to the quality and quantity of the light the designs would accomplish, upon which she relied in signing the contract; that, upon the dis-

covery thereof by the test made with the one furnished for that purpose, she had the right to refuse, as she did refuse, to accept or pay for any of them. This is disputed by counsel for respondent. The defenses are so nearly alike they may be considered together; indeed, by including the first within the latter, as is done in the pleading, they must be considered together under the general objection made by the respondent. Not much less could have been said than that expressed in the writing if the only purpose had been to protect the contract from the force of the statute of frauds; while the contention of respondent that the contract is so complete as to exclude proof of a breach of warranty we think is altogether untenable.

In the writing respondent offered not only to furnish, but to furnish and install, not simply crystal fixtures, but crystal fixtures of a special design as per design submitted. By whom submitted is suggested by the fact that the written offer is made by the respondent, but it is made plain by the answer, which alleges they were submitted by the respondent. That is, respondent submitted a special design of crystal fixtures, of which it would manufacture and install eight for the Carman (appellant) shop. It is not to be assumed that the things designed were intended as ornaments. The writing speaks of them as fixtures, that is, they were for use; and, not inconsistent with or altering the terms of the writing, the answer says they were to be used for the purpose of producing a certain kind and quality of electric light. Clearly appellant wanted something different from a known kind of fixture; for the writing says a special design is submitted, while the answer says a certain kind of effect was desired and explained to respondent's agent, who represented that, by the design it prepared, the desired effect would be obtained. Indeed, the designs actually manufac-

tured and offered by the respondent are so special and unusual that in its complaint it is alleged that the fixtures were specially prepared for appellant's special use and "are of no value to the said plaintiff, either as fixtures or as material." In addition, the answer, the allegations of which must now be taken as true, states that, after the manufacture of one of the fixtures, it was installed at appellant's place of business to ascertain if it would meet the required test, which conduct must be taken as an implied admission on the part of respondent of an outstanding warranty on its part of the efficiency of the fixtures as a part of the whole contract it was under obligations to perform. And yet counsel for respondent contend that the written contract was so complete as to preclude all inquiry as to any warranty concerning the fitness and efficiency for service of articles it specially manufactured according to special designs of its own for appellant's special use. The defense does not rely upon an implied warranty, but a special warranty is asserted. The contract is silent upon the subject of warranty, which is not at all inconsistent with its terms, and it appears upon its face, supplemented by the effect of the complaint, as not having been meant to specifically set out all of the terms of the agreement.

Clearly, if in a certain kind of case it is permissible to prove an implied warranty, a purchaser may in that kind of a case show there was a specific warranty to that same effect, if in fact a specific warranty was made. And in the present case it will be borne in mind that this contract is an executory one by which a manufacturer agreed to make and deliver articles designed to accomplish a special purpose. Upon this subject, this court, in the case of *Hurley-Mason Co. v. Stebbins, Walker & Spinning*, 79 Wash. 366, 140 Pac.

381, Ann. Cas. 1916A 948, L. R. A. 1915B 1131, said, on pages 380 and 381 of the opinion:

"According to the great weight of authority, there is a distinction between executory sales by manufacturers and executory sales by dealers; the rule being that, on a sale by a manufacturer, there is an implied warranty of fitness for the purpose intended, and of freedom from defects not discoverable by ordinary inspection and tests, while on a sale by a dealer, there is no such implication, in the absence of a specific warranty to that effect. All that is required of a dealer is an exercise of good faith and fair dealing. *Kellogg Bridge Co. v. Hamilton,* 110 U. S. 108; *Farrow v. Andrews & Co.,* 69 Ala. 96; *Hoe v. Sanborn,* 21 N. Y. 552, 78 Am. Dec. 163; *Remy, Schmidt & Pleissner v. Healy,* 161 Mich. 266, 126 N. W. 202, 29 L. R. A. (N. S.) 139; *Bierman v. City Mills Co.,* 151 N. Y. 482, 45 N. E. 856, 56 Am. St. 636, 37 L. R. A. 799; *Carleton v. Lombard, Ayres & Co., supra.*"

In the case of *Puget Sound Iron & Steel Works v. Clemmons,* 32 Wash. 36, 72 Pac. 465, this court, in discussing a manufacturer's sale upon a written order for a logging engine, said:

"Counsel for appellant strenuously argue that the order for the engine as set out above is conclusive against warranty of any kind, and that the respondents can not be heard to say that there was any other agreement than that contained in the order. A number of authorities are cited to the effect that, where an article is sold by a formal written contract, which is silent on the subject of warranty, no oral warranty made at the time or previously can be shown, as the writing is conclusively presumed to embody the whole contract. But these cases are generally cases where the articles purchased are of a special known kind, and where there was a formal contract embodying all the terms and conditions of the agreement. But there is no such formal contract in this case. The contract here is simply an order for the engine, signed in the form of a letter by respondent C. H. Clemmons only. It does not purport to contain any part of the contract

or conditions which the appellant was to perform. This court, in *Gordon v. Parke & Lacy Machinery Co.*, 10 Wash. 18 (38 Pac. 755), stated the rule as follows:

"'Where there have been collateral oral agreements, and the parties have not, by their written contract, appeared to intend to reduce their entire negotiation to written form, there are many cases sustaining the admission of parol evidence concerning the unwritten terms of such agreements. 17 Am. & Eng. Enc. Law, p. 443; *Pierce v. Woodward*, 6 Pick. 206; *Chapin v. Dobson*, 78 N. Y. 74 (34 Am. Rep. 512); *Willios v. Hulbert*, 117 Mass. 151; *Graffam v. Pierce*, 143 Mass. 386 (9 N. E. 819). But in all of the foregoing, as well as in many other cases which might be cited, the written contract itself was resorted to as the source of authority for receiving parol evidence; and this is the universal rule. "The test of the completeness of the writing proposed as a contract is the writing itself. If this bears evidence of careful preparation, of a deliberate regard for the many questions which would naturally arise out of the subject matter of the contract, if it is reasonable to conclude from it that the parties have therein expressed their final intentions in regard to the matters within the scope of the writing, then it will be deemed a complete and unalterable exposition of such intentions. If, on the other hand, the writing shows its informality on its face, there will be no presumption that it contains all the terms of the contract.'"

"Under this rule it is clear that parol evidence was admissible to prove a warranty in the case at bar."

The case of *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512, referred to in *Puget Sound Iron & Steel Works v. Clemmons, supra,* in quoting from the case of *Gordon v. Parke & Lacy Machinery Co.*, 10 Wash. 18, 38 Pac. 755, was a case of a manufacturer's sale and strikingly similar to the present one. That action was brought upon a written agreement, as follows:

"Philadelphia, July 9, 1868.

"We agree to furnish John Dobson with the following machinery, on terms stated: 16 48-inch and 7

60-inch first Breaker Feeders, at three hundred dollars each delivered at depot at Pawtucket, R. I., to be sent by steamer from Boston to Philadelphia, and allowance of three dollars to be made on each machine for freight. Man's time and expenses from Philadelphia to be charged extra for applying the machines. Terms, cash on delivery, 5 per cent commission to be allowed on each machine, 5 60-inch and 4 48-inch to be delivered as soon as possible, the balance in thirty days thereafter. Harwood & Quincy,

"Agents for Chapin & Downes.

"I agree to the above. John Dobson."

The defendant in that case, under a trial amendment of the answer, over plaintiff's objection that the agreement was embodied in the writing, which could not be varied by oral evidence, was permitted to show that plaintiff made an oral warranty that the machines should be made so as to do defendant's work well and satisfactorily, and that, as a fact, they were so badly constructed they could not be made to do defendant's work well and satisfactorily. The court of appeals sustained the ruling allowing the amendment and admitting the proof, and in discussing the matter said:

"The plaintiffs introduced in evidence a written instrument dated July 9, 1868. There is nothing upon its face to show that it was intended to express the whole contract between the parties. The referee finds that it does not contain it, and that the plaintiffs at the same time guaranteed to the defendant that the machines mentioned therein should be so made that they would do the defendant's work satisfactorily or they should not be paid for, and the defendant thereupon signed the writing in consideration of said guaranty. He also finds that the matters in writing and the above guaranty constituted the contract or agreement between the parties. It was within the province of the referee to make the finding above referred to (*Lindley v. Lacy*, 17 C. B. [N. S.] 578), and the evidence fully warrants it. The written contract related to machines thereafter to be manufactured by the

plaintiffs, fixed the price at which they were to be furnished, the number, the place and manner of delivery, the time and manner of payment. Nothing else was provided for. These terms are to remain as written. Some of them impose obligations upon the plaintiffs and others on the defendants. The parol agreement was on the part of the plaintiffs. By it they guaranteed 'that the machines should be so made that they would do the defendant's work satisfactorily.' The writing specified machines described as 'First Breaker Feeders,' of certain dimensions. How they should work, and whether well or ill is not stated. If it had called for a machine to satisfy a required purpose, of which the plaintiffs had notice and which they had undertaken to supply, they would have been bound as a condition of the contract to supply an article reasonably fit for the purpose, and a warranty would have been implied that it was so. (*Howard v. Hoey*, 23 Wend. 351; *Brown v. Edgington*, 2 M. & G. 279; *Jones v. Bright*, 5 Bing. 533; *Gaylord Manuf. Co. v. Allen*, 53 N. Y. 518.)

"It is contended however by the appellants that this rule does not apply in this case because a specific and designated machine was the subject of the contract. It may well be doubted whether, in view of the findings of the referee and his refusals to find, the case is brought within the rule laid down in cases on which the appellants rely, but it is not necessary to determine that question, for the guaranty as made does not contravene the written contract, and is not inconsistent with it. If the fitness of the machines is implied the guaranty is in harmony with it and adds nothing; if it is not implied the paper contains no declaration that the machines shall be taken with all faults and insufficiencies, or at the defendant's risk. The parol evidence therefore contradicts no term of the writing nor varies it.

"The written contract and the guaranty do not relate to the same subject matter. The contract is limited to a particular machine as such. The guaranty is limited to the capacity of the machine. It is one thing

to agree to sell or furnish machines of a specific kind, as of such a patent, or of a particular designation, and another thing to undertake that they shall operate in a particular manner or with a certain effect, or, as in this case, that they shall do the buyer's work satisfactorily. The first would be performed by the delivery of machines answering the description or the specifications of the patent; and whether they did or not conform thereto would be the only inquiry. As to the other, it in no respect touches the first, nor does it operate as a defeasance, but leaves it valid and to be performed, and the consequences of a breach of the guaranty are a recoupment or abatement of damages in favor of the defendant, and this is so, whether the contracts are in writing or not; for the guaranty is valid although not in writing, and the same rule must apply, for in either case the relation of the guaranty to the contract would be the same. In *Heyworth v. Hutchinson* (L. R. [2 Q. B.] 447), the defendants bought of the plaintiffs a specific quantity of wool, then at sea but expected to arrive; 'the wool to be guaranteed about similar to certain samples' referred to. The defendants refused to receive the wool alleging that it was not similar to the samples, and being sued for non-acceptance set up that fact as a defense. The court held it invalid, that the contract was for specific goods, and therefore the clause of guarantee was only collateral to the contract, and so the buyer could not reject the wool on the ground that it was not conformable to the sample, but his remedy would be either by a cross action on the guarantee or by giving the infirmity in evidence in reduction of damages. This case is in point. It seems plain both upon principle and authority that the plaintiffs' undertaking was collateral to the contract by which they undertook to furnish the machines, and that the referee committed no error in receiving the evidence objected to."

To the same effect, see: *Nashua Iron & Steel Co. v. Brush,* 91 Fed. 213; *Telluride Power Transmission Co. v. Crane Co.,* 208 Ill. 218, 70 N. E. 319; *Phelps v. Whitaker,* 37 Mich. 72; 2 Mechem, Sales, § 1255.

The case of *Buchanan v. Laber,* 39 Wash. 410, 81 Pac. 911, cited by respondent, is not in point, because it involved an attempt on the part of the purchaser to prove a warranty different from one made certain by the terms of the contract. That is, the contract covered the subject of warranty. Nor the case of *Buffalo Pitts Co. v. Shriner,* 41 Wash. 146, 82 Pac. 1016, in which there was an offer of proof tending to vary express terms of the written contract. To the same effect are the cases of *Hoffman v. Tribune Publishing Co.,* 65 Wash. 467, 118 Pac. 306; and *Mooney v. Mooney Co.,* 71 Wash. 258, 128 Pac. 225. The case of *Pacific Aviation Co. v. Philbrick,* 67 Wash. 414, 121 Pac. 864, was one in which the court found the writing was complete, covered the subject of warranty, and would not allow proof of a different kind of warranty; while the cases of *Eilers Music House v. Oriental Co.,* 69 Wash. 618, 125 Pac. 1023, and *Winton Motor Carriage Co. v. Blomberg,* 84 Wash. 451, 147 Pac. 21, were cases in which attempts were made to prove collateral agreements in the face of what were considered complete written contracts containing specific provisions to the effect that the contracts as written contained all of the agreements between the parties. Nor is the case of *Mianus Motor Works v. Vollans,* 83 Wash. 680, 145 Pac. 997, cited by respondent, in point. It was a case where machinery had been constructed upon information and data given by the purchaser's foreman, according to specifications and a blueprint submitted to the foreman, who was conversant with engines and machinery of that kind and who, during the time it was being manufactured for the vendor, without notice to the vendor, actually had changes or additions made not set out in the blueprint or in the specifications. There was no question in the case as to the foreman's author-

ity to bind the purchaser, and it happened the foreman tested the machinery, found it satisfactory, and accepted it before complaint, which was made later on. Other authorities cited by the respondent we do not review, believing it would serve no useful purpose.

As to the second main contention, we are equally well satisfied the defenses alleged are good. Taking the answers upon their face, there are allegations of false representations. It is alleged that respondent's agent, upon ascertaining what appellant wanted, represented he would supply it, and accordingly prepared a special design to accomplish that purpose. It is alleged she was without knowledge, or means of knowledge, of their falsity, or knowledge of the subject-matter of electricity and electric fixtures; that she relied upon and was induced by the false representations of respondent's agent to sign the writing, and that she denied liability and refused to accept the fixtures upon discovering they were unfit, and that the representations were false — clearly, averments of fraud which she was entitled to plead and prove, whether the contract was in writing or not. In legal effect, there was no consideration for her promise existing at the time of her refusal to pay.

The rule applicable in cases of this kind is expressed in *Agnew v. Hackett,* 80 Wash. 236, 141 Pac. 319, wherein, speaking of the defense of false representation of the plaintiff in making a sale of personal property, it was said:

"In cases of this character, liability is determined, not only by a statement of that which is known to be false; but false representations of material facts made to induce a party to act, and relying upon the truth of which he does act to his detriment, are actionable, whether the party making the false statements knew them to be false or not."

See, also, *Scribner v. Palmer,* 81 Wash. 470, 142 Pac. 1166; *George v. Kurdy,* 92 Wash. 277, 158 Pac. 965; *Griffith v. Strand,* 19 Wash. 686, 54 Pac. 613.

In the case of *Northwestern Lumber Co. v. Callendar,* 36 Wash. 492, 79 Pac. 30, the court said:

"It is unnecessary to cite authorities in this case, for it has already been established by this court, in accordance with the great weight of authority, in *Huntington v. Lombard,* 22 Wash. 202, 60 Pac. 414, that where one who is not familiar with machinery is dealing with one who is, the representations of the seller amount to a warranty of the machinery, whether so intended by him or not, if the purchaser relied on such statements as a warranty and was induced thereby to make the purchase."

Whether the appellant could have established the allegations of her defenses is not the question we are concerned with at this time. The error made by the trial court lies in the fact that appellant was precluded from introducing any evidence whatever upon the matters embraced within those allegations. Whether considered from the viewpoint of simply a motion to strike as "incompetent, irrelevant and immaterial," or as a general demurrer, the order of the court putting the affirmative defenses out of the case was erroneous, calling for a reversal of the judgment, which is hereby directed.

HOLCOMB, C. J., PARKER, and MAIN, JJ., concur.

[No. 15463. Department Two. January 20, 1920.]

B. B. LUTEN, *Appellant*, v. MICHAEL EARLES, *Respondent*.[1]

APPEAL (418)—REVIEW—FINDINGS. The weight of conflicting evidence and the credibility of the witnesses are peculiarly within the province of the trial court, and its findings will not be disturbed unless clearly wrong.

BANKS AND BANKING (40)—TRANSFER OF STOCK—IMPLIED WARRANTY. There is no implied warranty on the sale of bank stock by reason of the exhibition of the books of the bank where the seller expressly refused to warrant the correctness of the books.

Appeal from a judgment of the superior court for King county, Frater, J., entered February 3, 1919, upon findings in favor of the defendant, in an action for breach of warranty in the sale of corporate stock, tried to the court. Affirmed.

George H. Rummens and *Poe & Falknor*, for appellant.

Kerr & McCord (*Wm. Z. Kerr*, of counsel), for respondent.

MOUNT, J.—This action is founded upon a breach of warranty in the sale of certain shares of bank stock. The action was tried to the court without a jury, and resulted in a judgment in favor of the defendant. The plaintiff has appealed.

The facts are as follows: Prior to August 19, 1914, Michael Earles was a stockholder in the American Savings Bank and Trust Company, a banking corporation in Seattle. The capital stock of this bank was $200,000, divided into 2,000 shares of $100 each. Michael Earles owned 776 shares of this stock. He was the vice-president and a member of the board of trustees. Prior to that date one John H. Haak and

[1] Reported in 187 Pac. 349.

S. C. Jackson desired to purchase the shares of stock held by Mr. Earles. Mr. Earles had an agreement with one or two other stockholders of the bank that he would not sell his stock unless he sold their stock along with his at the same price. The total of the shares of stock controlled by Mr. Earles in this way was 1,211 shares. During the negotiations for the sale of this stock, the books of the bank were examined by Mr. Haak and Mr. Jackson. The paper in the bank was examined and checked up. It was finally agreed that Mr. Earles would sell his stock for $300 per share to Messrs. Haak and Jackson, who represented undisclosed principals in the transaction. This sale was concluded on the 19th day of August, 1914. Upon that date the bank's books showed the cash on hand at that time to be $196,315.02. The cash was not counted that day until after the sale of the stock by Mr. Earles to Messrs. Haak and Jackson. When the cash was counted it was discovered that there was a shortage of $8,500. The persons who acquired these 1,211 shares of stock thereafter assigned their claims to the appellant, who brought this action to recover against Mr. Earles the difference between the value of the stock as agreed upon and as it was by reason of the shortage of $8,500 cash in the bank. The action is based upon an alleged warranty of Mr. Earles that the cash in the bank was as shown by the books.

The issue tried in the court below was whether there was an express warranty. Witnesses on behalf of the appellant testified, in substance, that, when the transfer of the stock was being made, it was suggested that, since the cash had not been counted, Mr. Earles should guarantee that the actual cash in bank was the same as shown by the books; that Mr. Earles agreed to this. On the other hand, it was testified by Mr. Earles and witnesses in his behalf that he absolutely refused to

make any guaranty of the cash on hand or of the assets of the bank. Upon this issue the trial court found as follows:

"That said stock in said bank was sold by the said Earles to the purchasers without any representation on his part whatsoever as to the amount of cash on hand and without any representation on his part that there was $195,315.02 in cash on hand or any other sum whatsoever, and said stock was sold by said Earles with the statement to the purchasers that he would not guarantee the condition of the bank, and with the further statement that the purchasers were to take the stock as it was without any guarantee or representation of any nature or kind whatsoever."

Appellant makes two contentions: First, to the effect that the court erred in making this finding; and second, that there was an implied guaranty that the books showing the amount of cash on hand were correct.

Upon the first question, from what we have already stated it is apparent that there was a conflict of evidence. Several witnesses for the appellant testified that there was an express guaranty. As many witnesses for the respondent testified that there was no such guaranty, or that there was an absolute refusal to make any guaranty whatever. Upon this conflict of evidence, the trial court found as we have above quoted. This court has many times announced the rule that, where there is a conflict, the questions of the weight of the evidence and of the credibility of the witnesses are questions for determination peculiarly within the province of the trial court, and will not be disturbed unless we are clear that the trial court was wrong. *Hackett v. Scott,* 59 Wash. 390, 109 Pac. 1030; *Barr v. Kerfoot Investment Co.,* 90 Wash. 471, 156 Pac. 392; *Harrison v. Smith,* 98 Wash. 154, 167 Pac. 89.

Under the record in this case, we cannot say that the evidence preponderates in favor of the appellant on this point.

It is next argued by the appellant that, even though there was no express guaranty, there was an implied guaranty by reason of the exhibition of the books of the bank to the purchasers of this stock. It is no doubt the rule that, where the books of a bank, for example, are shown to a prospective purchaser of bank stock, and where nothing is said with reference to the correctness of the books, there will be an implied warranty that the books are correct. But where there is an express refusal on the part of the seller of the stock to warrant the correctness of the books, there is no implied warranty. The rule is stated in 35 Cyc. 393, as follows:

"When the seller has expressly refused to give a warranty, no warranty can be implied by law."

A number of authorities are there cited to support the rule.

The rule is stated in 24 R. C. L., § 451, page 178, as follows:

"On the other hand a warranty will not be implied in conflict with the express terms of the agreement, it being well settled that the seller may by express provision exclude the implication or importation therein of any warranties on his part, . . ."

So it follows that, since the court, upon the trial of the case, found upon sufficient evidence that there was an express refusal to guarantee or warrant the amount of cash on hand in the bank, no implied warranty to that effect may be indulged.

The judgment of the trial court is therefore affirmed.

HOLCOMB, C. J., FULLERTON, BRIDGES, and MACKINTOSH, JJ., concur.

[No. 15472. Department One. January 20, 1920.]

In the Matter of the Estate of J. T. BLOOR. ISABELLA K. BLOOR, *Appellant,* v. LOREN C. BLOOR *et al., Respondents.*[1]

HOMESTEAD (7) — SELECTION — NECESSITY. Under Rem. Code, §§ 528-561, no right of homestead existed in any specific property until it was selected and the selection recorded; and prior residence upon the land lends no support to the claim of homestead rights.

HOMESTEAD (7, 22)—SELECTION—SURVIVORS—STATUTES—REPEAL. Rem. Code, §§ 1465 and 1468, contemplating the vesting of title to the homestead in the widow and minor children on the death of the husband was in that respect repealed by §§ 528-561, requiring the selection of specific property.

HOMESTEAD (4, 21, 22)—HEAD OF FAMILY—RIGHTS OF SURVIVING SPOUSE. Neither the surviving husband nor wife who was not the "head of a family" within the meaning of Rem. Code, § 553, could acquire a homestead in community property when homestead rights had not been perfected prior to the death of the other spouse.

HOMESTEAD (22, 23)—RIGHTS OF SURVIVING WIFE AND HEIRS—STATUTES—RETROACTIVE EFFECT—VESTED RIGHTS. The probate code, Laws 1917, p. 670, § 103, enlarging the homestead rights of each spouse upon the death of the other, does not entitle a surviving wife to a homestead in the undivided half of community property that had not been selected as a homestead in the husband's lifetime, and had become vested in his heirs by descent prior to the taking effect of the act of 1917; since it would impair vested rights.

Appeal from a judgment of the superior court for San Juan county, Hardin, J., entered June 27, 1919, dismissing a petition to establish a homestead right in the community property of an estate. Affirmed.

Geo. A. Joiner, for appellant.

Ernest B. Herald, for respondents.

PARKER, J.—Isabella K. Bloor seeks to have set aside to her from the community real property of herself

[1] Reported in 187 Pac. 396.

and deceased husband, J. T. Bloor, a certain described tract of land as her homestead. The question of her right to such homestead was presented to the superior court for San Juan county, by her petition filed in the probate proceedings in the administration of the estate of J. T. Bloor, deceased, pending in that court. The matter was disposed of on the allegations of the petition and the objections thereto in the nature of a demurrer, filed by Loren C. Bloor, Libbie Bloor Jones, and Clifford H. Bloor, children of deceased by a former marriage, all of whom are of full age. The superior court having decided that the petition failed to state a cause for the granting of the relief prayed for, and the petitioner electing to stand upon her petition and not plead further, final judgment was rendered against her dismissing her petition, from which she has appealed to this court.

The controlling facts may be summarized from the allegations of the petition, as follows: Appellant is the widow of J. T. Bloor, who died in San Juan county in September, 1916. The land here in controversy, which appellant seeks to have set aside as her homestead, is situated in San Juan county, and was their community property for a period of about eighteen years prior to his death, during the whole of which period they resided thereon, and since his death she has resided thereon. No claim or declaration of homestead was ever made by J. T. Bloor in his lifetime, and no claim or declaration of homestead was ever made by appellant until the spring of 1919, the exact date of which does not appear in the record, when she filed a declaration under our general homestead law, §§ 528-561, Rem. Code, claiming as a homestead the land here in controversy, and thereafter filed her petition in this proceeding, seeking a judicial establishing of the land so claimed to be her homestead, to the end

that absolute title thereto vest in her under §§ 561 and 1468, Rem. Code, and § 103 of the new probate code, Laws of 1917, p. 670. There is no minor child of the deceased and appellant, or of either of them. There are no allegations of the petition touching the question of appellant being the head of a family within the meaning of § 553, Rem. Code, of our general homestead law. We must assume, therefore, as counsel on both sides of this controversy seem to, that her claim of homestead can have no support upon the theory of her being the head of a family. More than a year has expired since the publishing of notice to creditors, no claims have been filed against the estate, the funeral expenses and expenses of the last sickness of the deceased have been paid, and we assume that the property of the estate is now ready for distribution to the appellant as the surviving widow, and to the heirs of the deceased.

Since J. T. Bloor died in the year 1916, and the new probate code was enacted by the legislature of 1917, enlarging the homestead right of a surviving spouse; and the homestead declaration and claim of appellant here involved was filed in 1919; and the enlarged right of homestead under the new probate code of 1917, if given retroactive effect in favor of appellant as against the inheritance rights of the heirs of the deceased, which occurred immediately upon his death in 1916 under Rem. Code, § 1366, would, as we shall presently see, impair those accrued inheritance rights; it becomes necessary to determine whether appellant would be entitled to any homestead under the law as it existed at the time of the death of the deceased, prior to the act of 1917.

It had become the settled law of this state, prior to the act of 1917, that since the enactment of our general homestead law in 1895, Rem. Code, §§ 528-561, no right

of homestead existed in any specific property until it was selected and such selection evidenced in writing and recorded as therein provided. *Brace & Hergert Mill Co. v. Burbank,* 87 Wash. 356, 151 Pac. 803, Ann. Cas. 1917E 739; *In re Borrow's Estate,* 92 Wash. 143, 158 Pac. 735. It is therefore plain that the residence of appellant and her deceased husband upon the land in controversy, prior to the filing of her declaration of homestead and her petition in this proceeding, lends no legal support to her claim of homestead rights therein.

Counsel for appellant rely upon the provisions of §§ 1465 and 1468, Rem. Code. These sections, as we noticed in our decision in *Stewart v. Fitzsimmons,* 86 Wash. 55, 149 Pac. 659, were enacted as a part of the original probate law of 1854, which was before the enactment of our community property law, and imply a title in the deceased head of a family; and while that law contemplated the vesting of title to the homestead in the widow and minor children following the death of the husband, it was, in the latter respect, in effect repealed by the homestead law of 1895. *Stewin v. Thrift,* 30 Wash. 36, 70 Pac. 116; *Stewart v. Fitzsimmons,* 86 Wash. 55, 149 Pac. 659. Our decisions in *Fairfax v. Walters,* 66 Wash. 583, 120 Pac. 81, and *Clark v. Baker,* 76 Wash. 110, 135 Pac. 1025, do seem to hold that that law remained in force in so far as it gave to the widow alone a homestead right for a limited time in separate property of her deceased husband; that, however, is not the homestead right here in question, as we understand the claim of appellant. This proceeding we construe to be an effort on the part of appellant to claim a homestead in the community property of herself and the deceased husband such as will cause an absolute title to the land so claimed to vest in her as against the claims of the heirs

of the deceased. This, we think, she could not successfully do prior to the passing of the probate code of 1917, since she was not qualified to make such a claim by reason of the fact that she was not, at the time of filing her homestead declaration and her petition in this proceeding, the "head of a family."

In *In re Borrow's Estate,* 92 Wash. 143, 158 Pac. 735, there was involved the claim of a homestead in community property made by the surviving husband, by the filing of his declaration of homestead after the death of his wife, there being no minor child or other person under his care and maintenance, and hence he not being the "head of a family" within the meaning of the homestead law of 1895, Rem. Code, § 553. In that case it was squarely held that such surviving husband could not successfully claim a homestead in the community property because of his disqualification, in that he was not the head of a family when he made his claim therefor, after the death of his wife. A reading of the homestead law of 1895, Rem. Code, §§ 528-561, we think, renders it plain that the filing of a homestead declaration by a surviving wife stands upon no different footing, and confers no different rights upon her, than the filing of a homestead declaration by a surviving husband confers upon him. In order for a surviving wife to acquire a homestead right such as appellant is here seeking, it is as necessary that she be qualified by being the head of a family as it is that a surviving husband be so qualified before he can acquire such homestead rights. The decision rendered by this court in *In re Murphy's Estate,* 46 Wash. 574, 90 Pac. 916, read superficially, may seem out of harmony with our conclusion here reached, since that was a case where a surviving wife's homestead claim was protected by the court, though she was entirely alone in the world without any minor child or other person

dependent on her, that is, she was not the head of a family. The homestead right there involved had become perfected in community property by occupancy as a home by both spouses long before the enactment of the homestead law of 1895, at a time when occupancy as a home was all that was necessary to perfect such right. *Philbrick v. Andrews,* 8 Wash. 7, 35 Pac. 358; *Anderson v. Stadlmann,* 17 Wash. 433, 49 Pac. 1070; *Whitworth v. McKee,* 32 Wash. 83, 72 Pac. 1046. Manifestly, that surviving wife need do nothing other than to continue to occupy the home in order to perfect her homestead right. We conclude that appellant could not, after the death of her husband, successfully claim a homestead right in the community property such as she here seeks to acquire, prior to the passage of the new probate code of 1917.

Nor do we think she can acquire such homestead right under the new probate code of 1917. It is true that § 103 of that code, Laws of 1917, page 670, seems to materially enlarge the homestead right of each spouse when claimed after the death of the other. And it may be conceded that, if that law be controlling in our present inquiry, it would support the claim here made in appellant's behalf. It is to be remembered, however, that the rights of the heirs of J. T. Bloor, deceased, in this property accrued immediately upon the occurring of his death in 1916, and it would therefore seem to follow as a matter of course that the awarding to appellant of a homestead in this community property would be, in effect, awarding her a homestead in property the title to an undivided portion of which has already vested in the heirs of the deceased, and to that extent impair their vested rights. Rem. Code, § 1366; *Griffin v. Warburton,* 23 Wash. 231, 62 Pac. 765; *Bickford v. Stewart,* 55 Wash.

278, 104 Pac. 263, 34 L. R. A. (N. S.) 623; *Stewart v. Fitzsimmons,* 86 Wash. 55, 149 Pac. 659.

It is true that, in the last cited case, at page 62, it is recognized that the heirs take immediately upon the death of the deceased, "subject to existing laws and the right of the surviving spouse to assert a homestead out of the property." This, we think, however, can avail appellant nothing, for, as we have seen, she possessed no homestead right of the nature she here claims in this property, under the law existing at the time of her husband's death, since no declaration of homestead had been made by either of them prior to his death and she was not thereafter the head of a family. It would seem, therefore, that the inheritance rights of the heirs were not, at the time title vested in them immediately upon the death of the deceased, impaired, or subject to impairment, by any possible homestead right in appellant. Certainly it never was the intention of the legislature, in passing the probate act of 1917, to impair such vested rights by conferring a homestead right upon one who did not possess such right under existing laws in property the title to which had already vested in heirs by descent. It seems quite clear to us that the probate code of 1917 was not intended by the legislature to be retroactive in this respect; and if such legislative intent were evidenced by the terms of that act, it would indeed be difficult to escape the conclusion that it was other than unconstitutional.

In so far as there existed a homestead right in a surviving spouse under existing law prior to the passage of the probate law of 1917, it may be that the enactment of that law, expanding the homestead right of a surviving spouse, was merely a rewriting of such previously existing law looking to the preservation of

such existing rights. This would seem to be in harmony with observations made by Judge Chadwick, speaking for the court in *In re Lavenberg's Estate,* 104 Wash. 515, 177 Pac. 328. But that is quite a different thing from materially expanding the right of homestead in a surviving spouse, as the probate code of 1917 does, and giving it such retroactive effect as to impair inheritance rights which became fully vested in heirs before its passage.

It will be understood, of course, that our decision on the question here presented does not in the least impair whatever right, apart from her claim of homestead right, appellant may have as the widow of deceased or as his heir, in this and other community property possessed by them at the time of his death. We are quite convinced that the judgment of the trial court must be affirmed.

It is so ordered.

HOLCOMB, C. J., MITCHELL, MACKINTOSH, and MAIN, JJ., concur.

[No. 15474. Department One. January 20, 1920.]

A. P. DONAHUE, *Respondent*, v. H. J. HASKAMP *et al.*, *Appellants*.[1]

RECORDS (3)—RECORDING WRITTEN INSTRUMENTS—NOTICE. The recording of an agent's contract for a share in the profits of lands purchased is notice to subsequent purchasers of his rights.

EQUITY (38)—MAXIMS—CLEAN HANDS. A conveyance of land with notice of defendant's rights therein so that his interests were not affected is not a fraud that would defeat plaintiff's right to equitable relief.

JOINT ADVENTURES—PROFIT SHARING IN PURCHASE OF LANDS. A joint adventure, and not a partnership, is constituted by an agreement whereby defendant employed plaintiff as agent in purchasing timber land, the plaintiff to receive a certain per cent of the net profits and to share the same proportion of the losses, where there was no mutual agency and the control of the lands purchased was entirely in the defendant.

SAME—RIGHTS OF PARTIES—TERMINATION. In such a case, where, owing to the war, it was impossible to dispose of the lands at a profit, it would be unconscionable to hold the property indefinitely; and the purchases having been made and the capital invested, plaintiff should be given one year to dispose of the property and account for the proceeds in accordance with the contract, at the end of which time it will be deemed performed and the undertaking terminated.

Appeal from a judgment of the superior court for Klickitat county, Darch, J., entered November 20, 1918, in favor of the plaintiff, in an action for equitable relief, tried to the court. Modified.

Sharpstein, Smith & Sharpstein, for appellants.

Veazie, McCourt & Veazie and *Brooks & Brooks*, for respondent.

HOLCOMB, C. J. — On September 9, 1911, plaintiff and defendant Haskamp entered into a written contract wherein defendant agreed to employ plaintiff as

[1] Reported in 187 Pac. 346.

agent in purchasing timber land, defendant agreeing to pay the purchase price, all necessary expenses incurred in the purchase, the taxes and other expenses necessary or authorized by defendant. It was further agreed that, after deducting all expenses, as set forth, and interest upon all expenditures at eight per cent per annum, compounded annually, plaintiff would receive twenty-five per cent of the net profits. Plaintiff agreed to inspect the lands, make reports to defendant, and to negotiate and close purchases from defendant, when authorized by defendant. Title to the property was agreed to be in defendant. The losses, if any, were to be shared in the same proportion as the profits.

Pursuant to this agreement, plaintiff purchased certain timber land for defendant Haskamp, the purchases covering a period of about three years and the total expenditure being about $114,000. In 1914, defendant Haskamp agreed with others for the construction of a railroad to or near the timber lands, plaintiff agreeing that $25,000 paid by defendant as a bonus for the construction of the railroad be charged as part of the expenditure for the land, and agreeing that he would perform services in seeing to the construction of the railroad and application of the bonus. Plaintiff did later perform those services and the railroad was completed about July 15, 1916.

On August 2, 1916, plaintiff caused the contract with defendant, together with a certified list of the land purchased under the contract, to be filed of record in the office of the county auditor of Klickitat county, in which the land was situated.

On September 25, 1916, defendant conveyed by deed to the Washington Farm & Fruit Association, a corporation organized and owned by members of defendant's family and under his control, all of these lands.

The deed in no way purported to recognize the rights of plaintiff in the land.

This action was forthwith commenced, plaintiff seeking a reconveyance of the land to defendant. The defendant, by his answer, consented to a reconveyance and asked that the land be sold under the direction of the court and an accounting be had between the parties. The court entered a decree ordering a reconveyance and affirming the rights of plaintiff, by virtue of his contract, in the land.

The land was bought at a price of from fourteen to fifteen dollars an acre. When the taxes and cost of fire protection and other expenditures, together with the interest provided for in the contract, are taken into consideration, it appears that, in order to realize a profit for the parties to the contract, it would have been necessary to sell the lands in 1916 for between twenty-five and thirty dollars an acre. Due to causes that could not be foreseen, principally the fact that the country was engaged in the European war, by the time these timber lands were purchased, there was little or no money seeking this kind of an investment and no sale could be made. The market for timber land steadily declined, and by the summer of 1916 it did not appear that it would be possible to realize a profit on this undertaking.

For some time prior to the summer of 1916, defendant's health had been very poor and his sons-in-law and other relatives, some of whom later became stockholders in the Washington Farm & Fruit Association, had been handling his business affairs. The capital with which he had been doing business for thirty-six years past was originally inherited by his wife, and with the idea of relieving both of them of the personal care and attention their properties demanded, the cor-

poration was organized and the bulk of their property, including the timber land, was conveyed to it. Plaintiff's contract was of record and any purchaser of the timber land to which his contractual rights attached would be charged with notice of his claim of interest in the land. Besides, at that time it seemed to defendant that any further opportunity for profit growing out of the transaction had ceased. We find it difficult to say that defendant is guilty of fraud in the transaction, so that his prayer for relief before a court of equity will not be heeded. His conveyance of the land to the corporation did not in any way divest plaintiff of any rights he has in the land by virtue of the contract. Therefore, when the land is reconveyed by the corporation to the defendant, plaintiff's rights are in exactly the same condition they always have been and are in no greater hazard.

We are not impressed with appellant's contention that this contract made the parties partners in the undertaking. In no place in the contract, except one which will be presently noted, is there language indicating that it was the intention of the parties to constitute a partnership between them. It is true, the contract did provide for a division of the profits or losses. But not every contract so providing constitutes the parties thereto partners. That is not the sole test of partnership. None of the other indicia of partnership are present in the relation between these parties. Take the very definitions and citations of appellant and it is plain that the parties do not come within them. Appellant quotes from Law of Partnership, Bates, vol. 1, § 17, to show that, if the actual relation of the parties are those of partners, their declarations in their contract will not change that relation. Here we have no actual relation between the parties as

partners. There was lacking the mutual agency necessary for that relation. Donahue was totally unable to bind Haskamp to any agreement or by any purchase or sale without Haskamp's authority in each specific transaction. He did not purchase one acre of land without first consulting Haskamp, and the record shows that, before expending any money whatever to further the scheme they had in mind, he was obliged to consult Haskamp for authority. He could not sell until Haskamp placed a price upon the land or signified a willingness to accept a stated price. The relation between these parties comes more nearly under the definition of a joint venture. It related to the single transaction of the purchase and sale of timber land, although that transaction might comprehend a business to be continued for a number of years. *Zeck v. Bell,* 94 Wash. 344, 162 Pac. 363. Similar arrangements have been uniformly construed as joint adventures rather than copartnerships. *Seattle Land Co. v. Day,* 2 Wash. 451, 27 Pac. 74; *Kauffman v. Baillie,* 46 Wash. 248, 89 Pac. 548; *Bane v. Dow,* 80 Wash. 631, 142 Pac. 23; *Seymour v. Freer,* 8 Wall. (75 U. S.) 202; *Shaeffer v. Blair,* 149 U. S. 248.

But even though this be a joint adventure and not a copartnership which might be dissolved and the partnership affairs wound up at the suit of either party, and while we might hold in a proper case with the majority of the courts that, in the case of a joint adventure, either party has a right to insist that the property be disposed of in the contract method, instead of by the court, yet it would be unconscionable to hold that this property could be tied up for an indefinite time with increasing liability for a loss on the whole transaction. The parties have completed the purchases apparently intended by the contract. The

capital invested is drawing interest at eight per cent, compounded annually. The plaintiff testified that it was his belief that, within three years after the termination of the war the country was then engaged in, he would be able to dispose of the lands at a profit to the parties. It is a fact of common knowledge that the unusual conditions brought about in the money market and in business generally by the war depressed the market for timber land, and it seems equitable that plaintiff should have another year within which to produce purchasers for the timber and land, and the decree of the trial court should be modified to allow plaintiff one year to dispose of the property and account for the proceeds in accordance with the contract between them, at the end of which time the contract will be deemed performed and the undertaking terminated. It is so ordered.

Appellant, having obtained a more favorable judgment in this court, is entitled to judgment for costs on appeal.

MITCHELL, PARKER, MAIN, and MACKINTOSH, JJ., concur.

[No. 15298. *En Banc.* January 27, 1920.]

LOUIS H. MOORE, *as State Bank Examiner, Appellant,* v. CLAUS F. BAASCH *et al., Respondents.*[1]

CONTRACTS (66)—CONSTRUING INSTRUMENTS TOGETHER. A tentative agreement for the amalgamation of two banks, and a reciprocal guarantee agreement on the part of the stockholders, made and entered into at the same time, must be considered together.

GUARANTY (9)—CONSTRUCTION—SCOPE OF CONTRACT—BENEFICIARIES. Where bank directors and stockholders agreed to the amalgamation of two banks, the stockholders at the time entering into a reciprocal guaranty of the paper held, the new organization was the direct beneficiary of the guaranty agreement, notwithstanding a resultant benefit to the stockholders; in view of provisions in the two contracts, considered together, whereby the paper guaranteed was to be taken over and collected by the new bank for its own benefit, and funds collected under the guaranty were to be paid to it.

PARTIES (3, 4)—BANKS AND BANKING (7)—ASSETS ON INSOLVENCY—REAL PARTY IN INTEREST—TRUSTEES—STATE BANK EXAMINER. A bank, being the direct beneficiary of a reciprocal guaranty of paper taken over at the time of its organization, and entitled to collect the paper, the state bank examiner, taking over the bank upon its insolvency, may maintain an action on the guaranty as the real party in interest, under Rem. Code, § 179.

FRAUDS, STATUTE OF (4) — ORIGINAL UNDERTAKING — ACTIONS — PARTIES PLAINTIFF. Where one promises, upon a valuable consideration, to pay the debt of another to a third person, the latter may maintain an action thereon in his own name.

GUARANTY (9)—BANKS AND BANKING (7)—ASSETS ON INSOLVENCY. Where a stockholders' reciprocal agreement guaranteeing the paper taken over by an amalgamated bank was accepted and acted upon, it cannot be rescinded by the stockholders without the consent of the bank.

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 15, 1919, upon sustaining a demurrer to the complaint, dismissing an action on a guaranty agreement. Reversed.

[1] Reported in 187 Pac. 388.

C. H. Winders (*Joseph C. Sherman*, of counsel), for appellant.

Flick & Paul, Hartman & Hartman, Burkheimer & Burkheimer, Donworth, Todd & Higgins, Emil J. Brandt, Wm. E. Froude, and *F. W. Crary*, for respondents.

MAIN, J.—This is an action brought by the state bank examiner to recover upon a guaranty agreement. To his complaint the defendants in the action interposed a demurrer based on statutory grounds, which the trial court sustained. The bank examiner elected to stand on his complaint and refused to plead further, whereupon the court entered a judgment dismissing his action with prejudice. This is an appeal by the bank examiner from the judgment so entered.

The facts, as disclosed by the complaint, show that, in the year 1914, there were in the city of Seattle two banking institutions, the one, the Mercantile National Bank, operating under a Federal charter, and the other, the German-American Bank, operating under a charter derived from the state of Washington, each doing a general banking business. In the early part of the year named, certain of the officers and stockholders of the institutions conceived the idea of amalgamating the business of the institutions and agreed upon a tentative plan looking to that end. The plan, as reduced to writing, was as follows:

"The following proposition is submitted to the officers and trustees of The Mercantile National Bank and the German-American Bank, both of Seattle, the acceptance of both of said banks to be indorsed hereon in case of approval, such other and further instruments as may be necessary to carry the plan as herein outlined into full force and effect to be executed by both parties.

"(I) The Mercantile National Bank is to turn over, as soon as it may be permitted to do so under the Federal laws relating to the liquidation of national banks, all of its accounts, notes, holdings, and business, including good-will. The German-American Bank is to file supplemental and amendatory articles of incorporation, increasing its capital stock $100,000, so as to make a capital stock of $200,000, and changing its name from German-American Bank to German-American Mercantile Bank.

"(II) The German-American Bank of Seattle is to pass such resolution and obtain the execution of such instruments by its stockholders, or otherwise, as may be necessary to permit the additional $100,000 of stock to be subscribed, in form as shown by Exhibit 'A-1' attached, by such persons as may be named by the present board of trustees of The Mercantile National Bank, such stock to be subscribed within twenty days from the date of formal execution of this agreement, and to be paid in cash at par within fifteen days after such increase has been legally authorized, or in fifteen days after the stockholders of the German-American Bank of Seattle have ratified and assented to this contract in writing.

"(III) The German-American Mercantile Bank, upon the increase of its capital stock in accordance with its by-laws, is to make provision so that its board of trustees shall consist of only nine members, and that its officers shall consist of a president, two vice-presidents, a cashier, and a chairman of its board of directors. Resignations of all of the present board of trustees of the German-American Bank shall be obtained, and such instruments are to be executed, or such arrangements made, as may be necessary to insure the election of a new board of trustees, as follows: Four trustees to be elected by the present stockholders of the German-American Bank, four trustees to be named by the stockholders of The Mercantile National Bank, and who subscribe to the increased $100,000 of stock, the ninth trustee to be chosen by the eight trustees so chosen. It is understood by the parties that the election of the board of trustees is a matter within

the hands of the present trustees or the stockholders, but that such arrangements will be made as will effectuate an election of trustees as provided for above, by-laws defining the duties and authority of the officers as provided for to be in substance as shown by form marked Exhibit 'B-2,' attached hereto.

"(IV) The German-American Mercantile Bank is to take over at par and accrued interest all of the bills receivable, obligations, and investments of The Mercantile National Bank which can be turned over to it under the statutes of the United States governing the liquidation of national banks, and is to take over at present book value its banking furniture and fixtures, subject to reduction, if any, made by order of state bank examiner, provided, however, that the stockholders of The Mercantile National Bank are to assume all lease accounts and all responsibility on account of the lease now held upon the banking house occupied by such bank.

"(V) The stockholders of The Mercantile National Bank who subscribe the additional $100,000 of stock in the German-American Mercantile Bank are to execute a good and sufficient guarantee to a trustee to be named by the stockholders of the German-American Bank so as to insure it against loss upon any of the obligations, investments, or property turned over to it by The Mercantile National Bank, if the same exceed the sum of $12,500, that is, the stockholders of the Mercantile National Bank who subscribe the additional $100,000 of stock of the German-American Mercantile Bank are to guarantee that there will be no loss upon any of the obligations, property, or investments of The Mercantile National Bank turned over to the German-American Mercantile Bank in excess of the sum of $12,500. The stockholders of German-American Bank of Seattle, in a manner so as to bind such stockholders, shall execute a good and sufficient guarantee to a trustee to be named by the stockholders of The Mercantile National Bank, or the individuals whom its board of trustees may name to subscribe the additional $100,000 of stock in the German-American Mercantile Bank, under which they shall guarantee said bank

against loss upon any of its paper or property in excess of the sum of $12,500; provided that, if there be a loss upon any obligations or property held by it in excess of $12,500, then there shall be credited on any such deficiency the amount of any surplus and net earnings as of date of the actual amalgamation of the two institutions, it being agreed that any balance remaining out of said surplus and net earnings not needed as just specified shall revert to the old stockholders of German-American Bank of Seattle. The agreement of guarantee is to be conditioned that the officers of the German-American Mercantile Bank may apply towards any deficiency arising hereunder pro rata any dividends which may subsequently arise upon the stock of the stockholders of said bank. The agreement of guarantee to be in substance as shown by form attached hereto and marked Exhibit 'C.'

"(VI) The German-American Bank is also to absorb or otherwise care for its leasehold and improvement account in excess of $3,500, it being understood, however, that this account does not include the $4,000 deposited on account of rent paid in advance.

"(VII) Both banks are agreed that upon the approval of this tentative proposition by their respective boards of trustees that they will forthwith proceed to carry out the necessary steps for the purpose of giving effect to this agreement, it being the purpose of the parties to effect an amalgamation of the two banks to do business under the name of German-American Mercantile Bank, as a state institution; and both banks understand that this agreement is not a final or complete agreement in detail, but that such other or further agreements to carry into effect the matters set forth in this proposition, or that would reasonably arise therefrom, will be executed.

"(VIII) It is understood that nothing herein contained shall be construed as requiring The Mercantile National Bank to turn over any notes or other obligations of doubtful value. It is further understood that said bank is to be liquidated, and that this agreement covers only the taking over of the good-will, accounts, notes, properties, and business of The Mercantile Na-

tional Bank, and that all of the present stockholders of The Mercantile National Bank will not be subscribers to the additional $100,000 of stock as provided for herein."

The exhibit "C" attached to the plan submitted (the proposed guaranty agreement) reads as follows:

"Know all men by these presents: That, Whereas, The undersigned are holders of the whole, or a majority, of the outstanding capital stock of the German-American Bank, a banking corporation organized pursuant to the laws of the State of Washington relating to the organization of banks under state charter; and,

"Whereas, In contemplation of liquidation, the officers and stockholders, or a part thereof, of The Mercantile National Bank, a national banking corporation doing business at Seattle, Washington, have agreed, so far as within their power and as may be consistent with the statutes of the United States, to turn over its present banking business, *i. e.*, notes, obligations, investments, accounts, and good-will, in accordance with a plan outlined in a written memorandum understood by the officers of the German-American Bank, at such time as necessary steps can be taken under the federal statutes, and have also undertaken and agreed to subscribe for $100,000 worth of additional stock of the German-American Bank, its capital stock now being increased from $100,000 to $200,000, and all of the stockholders of the German-American Bank agreeing that the additional $100,000 worth of stock shall be subscribed by a part of the present stockholders or trustees of The Mercantile National Bank, as may be directed by its present board of trustees; and,

"Whereas, As a condition of the transfer of the good-will and business of The Mercantile National Bank to the German-American Bank, among other things, the stockholders and trustees of said bank subscribing said additional $100,000 worth of capital stock have made it a condition precedent to carrying through their agreement to transfer said business and subscribe said stock that the present stockholders of the German-American Bank, or a majority thereof,

execute a good and sufficient guarantee, guaranteeing to them, under such instruments as may be proper, that all of the loans and investments at present held by the German-American Bank are good and that there will be no loss thereon in excess of the sum of $12,500, have required, as a condition precedent to the carrying through of their part of said agreement, the execution of such an agreement of guarantee, and a further agreement, as additional security, that all dividends that may be declared upon the stock belonging to any of the undersigned in said German-American Bank, for the period covered thereby, may be applied towards making up any deficiency that may arise by reason of there being any loss upon any of the outstanding paper or other property of the German-American Bank in excess of the sum of $12,500; it being agreed that no liability will be asserted hereunder if there be no loss upon the existing paper or property of said bank in excess of the sum of $12,500, and it being further agreed that there is to be first applied upon any greater deficiency the amount of the surplus and net earnings of said German-American Bank as of date of the consummation of what may be termed the amalgamation of the two banks, which it is agreed shall be of date of turning over of the accounts and obligations of The Mercantile National Bank; and,

"Whereas, The undersigned and each of them acknowledge that the turning over by the stockholders and trustees of The Mercantile National Bank of its business, so far as the same may be done, and in the manner as outlined in the memorandum of agreement approved by the board of trustees of the German-American Bank, and the subscription by them of the additional $100,000 worth of stock in the German-American Bank, or its successor (it being understood that its capital stock is to be increased to $200,000 and its name changed to German-American Mercantile Bank), and the execution by the subscribers to said stock of a like agreement of guarantee with relation to the properties and assets turned over to the German-American Bank, is a valuable and sufficient consideration for the execution of this agreement; and,

"Whereas, In order to more effectually carry into effect the agreement of the undersigned, H. Middaugh, or his successor, has been appointed as trustee to represent and act for the stockholders of The Mercantile National Bank, as subscribers to the additional $100,000 of stock of the German-American Bank which is to be subscribed by them; and,

"Whereas, H. Middaugh, or his successor, has been duly designated by such stockholders of The Mercantile National Bank to act as trustee, for their use and benefit under the terms of this agreement;

"Now Then, These Presents Witnesseth: That for and in consideration of the benefits accruing to us and each of us by reason of the matters and things hereinbefore referred to, and for a valuable consideration, the receipt of which is hereby expressly acknowledged, the undersigned, and each of us hereby bind ourselves and each of us, in proportion to the stock subscription of the undersigned to the old capitalization of $100,000 in said German-American Bank, forthwith after six months' notice after demand in writing made by H. Middaugh, as trustee, or his successor, to pay to him from time to time the full amount of any loss in excess of the sum of $12,500, plus the undivided net earnings and surplus as of date of the actual consummation of the proper amalgamation, so-called, of the German-American Bank of Seattle, and The Mercantile National Bank, and arising, if at all, as the result of any bad or slow paper, or other investments now owned by the German-American Bank of Seattle, and the property of said bank at the time of the so-called amalgamation, and it is agreed that as soon as any loss in excess of said sum is ascertained demand may be made, and thereafter from time to time as loss may arise or as may be found proper by said trustee; and it is understood and agreed that the entry of judgment upon any obligations now held by said bank and the return of the sheriff of King county, Washington, or the officer of any other county in which suit is brought, of the fact that no property of the judgment creditor can be located, *i. e.*, a return of *nulla bona,* shall be conclusive that the amount of the obligation so re-

duced to judgment is a loss, it being understood, however, that if by a two-thirds vote of the then board of trustees of the German-American Bank, or its successor, any paper or obligations be declared to be a loss, or if any paper is required to be charged off by the bank examiner, such action shall be conclusive evidence of such loss.

"It is understood and agreed, however, that said trustees may at any time demand that the officers of the German-American Bank, or its successor, shall cause any note, then in said bank, to be paid within a period of six months, or that additional security be given therefor, and if it is not so paid, or if additional security is not furnished, then he shall forthwith have the right to make demand to make the claim that said note or obligation is a loss; provided, however, said trustee named to operate under this guaranty, for The Mercantile National Bank, as now constituted, shall in the event that he is about to demand payment on any paper, or obligation in the manner mentioned in said instrument, call into consultation one of the directors representing at this time stock in the German-American Bank, and if said director agrees with him that the call shall be made it shall be forthwith made as provided. In the event, however, that said director disagrees with the trustee, one of the directors named by the stockholders of the new stock shall be called in conference, and if he agrees with the said trustee, said call shall forthwith be made, and if he disagrees said paper shall thereupon remain uncalled, unless subject to other action by two-thirds vote of the board of trustees thereafter, same is called.

"It is further agreed, and the president and other officers of the German-American Bank, or its successor, are hereby authorized upon notice and demand from said trustee (and this instrument shall be deemed sufficient to vest such power in said trustee), to apply towards any loss, if any, in excess of the amount hereinabove specified, on existing obligations of the German-American Bank, any dividends which may be declared from time to time upon the stock which we now own, and for such purpose we hereby transfer and as-

sign to such trustee all dividends that may be declared upon the stock which we and each of us now hold, said assignment to be effective only in case there be a liability hereunder; but nothing in this provision with relation to the assignment of dividends shall in any way be construed as preventing said trustee from making demand and taking such other action as he may think necessary and proper for the purpose of obtaining hereunder the necessary funds to take up any deficiency that may arise, limited, however, to the methods of calling the obligations herein outlined; and it is understood and agreed that as deficiencies, if any, arise, demand may be made, and that no demand or payment shall be construed to in any way release the undersigned or either of them from any future liability during the life of this agreement for other or additional demands. It is understood and agreed, however, that no demands shall be made for the payment hereunder from and after the first day of July, 1917, that is, that unless the loss is determined or ascertained prior to such date, then there shall be no further liability hereunder upon the undersigned or either of them.

"It is understood and agreed that this agreement is to be binding upon each of us, and our respective heirs, assigns, executors, and administrators, for all losses covered hereby severally in the proportion the stock owned by us in our respective names bears to the total of the stock represented by the signatures hereto, that is, our liability for all losses for which demand may be made from time to time hereunder shall be severally for the portion thereof as our respective holdings bear to the entire stock represented hereby, it being understood that this agreement is to be effective if signed by the owners or a majority of the owners of the present outstanding stock of the German-American Bank, and we and each of us undertake and agree and bind ourselves to pay, within a period of six months after each demand during the life of this agreement, severally the proportion of the indebtedness represented by said demand as our present stock-

holdings bear to the total stock represented by the signatures hereto.

"It is further understood and agreed that if payment is not made hereunder by us or any of us of our proportionate amount of said loss, as hereinabove provided, within six months after demand, then all unpaid demands shall bear interest at the rate of eight per cent per annum from the date upon which payment should be made; and it is further understood and agreed that if suit is brought to recover any demand or demands hereunder, then in every action so brought we and each of us bind ourselves to pay, in addition to the sum found due, a reasonable amount as an attorney's fee, such amount to be fixed by the court.

"We further undertake and agree to present our stock to a proper officer of the German-American Bank, or its successor, and agree that such officer may indorse thereon a memorandum impressing the same with the terms of this agreement.

"It is further understood and agreed that the subscribers to the additional $100,000 par of stock of the German-American Bank, or its successor, and who are protected hereby, may at any time, by a majority vote, name a new trustee, who shall be vested with the same authority and powers as the trustee named herein. It is understood and agreed that the trustee representing the stockholders of the now The Mercantile National Bank, who subscribe the additional $100,000 of stock, is to account to the German-American Bank, or its successor, for all sums paid or collected hereunder, less legitimate expenses incident thereto, that is, that the funds to be collected hereunder are to be collected for the use and benefit of the German-American Bank, or its successor.

"This agreement is to be delivered upon the delivery of I. J. Riley, as trustee for us and each of us, of an agreement of guaranty of similar import, and covering obligations and properties turned over or to be turned over by The Mercantile National Bank to the German-American Bank, or its successor, the German-American Mercantile Bank, together with an original subscription list containing the names of the subscrib-

ers to the new stock, and upon payment of the amount of $100,000 in cash to said German-American Bank, or its successors, the purchase price of said stock."

These instruments were submitted to the stockholders of the respective banks at meetings specially called to consider them, and were duly and regularly approved and adopted by the officers and stockholders thereof. Acting pursuant thereto, the German-American Bank, by appropriate proceedings, changed its name from German-American Bank to German-American Mercantile Bank, reduced the membership of its board of trustees to nine in number, increased its capital stock from $100,000 to $200,000, permitted the stockholders of the Mercantile National Bank to subscribe for the excess capitalization, took over the deposits and such of the notes and other assets of the Mercantile National Bank as the agreement contemplated, and, generally, complied with all of the terms of the agreement. In the meantime certain of its stockholders, the defendants in the present action, executed the guaranty agreement in the form as we have set it forth. As this suit pertains only to the guaranty of the stockholders of the German-American Bank, the action taken by the stockholders and officers of the Mercantile National Bank is not detailed in the complaint. It is alleged generally, however, that it went into voluntary liquidation, and that the "various provisions of the plan or proposition looking to the amalgamation of the business of the" two banks, including the execution of the reciprocal guaranty agreement, "were duly carried out." The proceedings had with relation to the reorganization of the German-American Bank, and the transfer to it of the assets of the Mercantile National Bank, were completed as of date August 29, 1914, and the reciprocal guaranty agreements were delivered to the respective trustees named

therein on the same day; the German-American Bank from thence on continuing its business under its new name of German-American Mercantile Bank.

On January 27, 1915, the state bank examiner required the bank to charge off from its listed assets, as unbankable paper, notes and other securities representing its loans and investments of a face value in excess of $30,000. These securities were among those held by the German-American Bank at the time of the amalgamation and were covered by the guaranty agreement. While the allegations of the complaint are to us not entirely clear concerning the matter, this seems to have been settled by deducting from the total sum of the assets found unbankable the sum of $12,500, the maximum sum not covered by the guaranty agreement, the surplus and net earnings of the German-American Bank on hand at the time of the amalgamation, and by the payment by the guarantors of the difference; thus absorbing all of the credits permitted the guarantors by the agreement. Under the dates of November 8, 1915, February 19, 1916, and December 30, 1916, the bank examiner required the bank to charge off other paper covered by the guaranty agreement, of the face value of $6,446. These notes were certified by the directors of the bank to the trustee named in the agreement as nonbankable paper, and demand was made by the trustee on the obligors therein for the payment of the amount thereof. No compliance was made with this demand.

On January 31, 1917, the German-American Mercantile Bank was found and declared to be insolvent by the bank examiner and possession of its assets was then taken by him. In the course of his administration of the bank's affairs, the bank examiner found other loans and investments carried by the bank, which were a part of the loans and investments of the

German-American Bank at the time of the amalgamation and which were turned over to the German-American Mercantile Bank at that time, to be uncollectible and a loss to the bank. The character and amounts of these are summarized in the complaint in the following manner:

Notes	$44,267.77
Real estate loans.....	44,362.54
Claims and judgments.....	13,399.54
Loss on real estate.....	9,172.61
Making a total of.....	$111,172.46

On May 23, 1917, these items were declared to be a loss, within the meaning of the terms of the guaranty agreement, by both the bank examiner and the board of directors of the German-American Mercantile Bank and certified as such to the trustee named in the agreement, and that person, on the same day, made demand on the obligors named in the agreement for payment. The demand was not complied with within the six months permitted by the guaranty agreement, nor at any time, whereupon the present action was begun, with the result before stated.

While extended briefs have been filed by the parties to the appeal, in which many questions are discussed, it has seemed to us that the primary and controlling question is, who is the real beneficiary of the guaranty agreement. On this question, it is the appellant's contention that the real beneficiary is the bank; that the obligors in the agreements are only the incidental beneficiaries thereof, and from this the conclusion is drawn that the bank could have sued upon the agreements, and, in consequence, the bank examiner can sue thereon as the representative of the bank. On the other hand, the respondents contend that the real beneficiaries are the obligors; that the bank is only

an incidental beneficiary thereof, and hence the bank never had, and could not have, a right of action on the agreements, and that no such right inures to the bank examiner.

To determine which of these respective contentions should be sustained resort must be primarily to the two contracts above set out, and especially to the second one. The first contract is referred to as the tentative agreement, and the other as the reciprocal guaranty agreement. The fact must be kept constantly in mind that it was the two banks that were amalgamated. The German-American Bank was taking over the paper, the business and the assets of the Mercantile National Bank, the latter bank expecting to go into liquidation. To effect this amalgamation the banks must act as entities, and in this capacity must speak through its stockholders in meetings regularly called for the purpose.

On the fifth day of August, 1914, a special meeting of the stockholders of the German-American Bank assembled pursuant to a call regularly issued. The minutes of this meeting are made a part of the complaint and show that the object of the meeting was to increase the capital stock of the German-American Bank to two hundred thousand, to change the name of the bank to that of the German-American Mercantile Bank, and to amalgamate with the bank the assets, business, and good will of the Mercantile National Bank. At this meeting resolutions were passed covering the proposed amalgamation and providing that the board of directors should comprise nine members instead of fifteen. The minutes of the meeting recite that the tentative agreement and the guaranty agreement were read paragraph by paragraph, were approved by the stockholders' meeting, and "were thereupon signed by the parties whose names appear on the

originals thereof, which were ordered spread upon the minutes of the meeting." The parties who signed these agreements are, with the exception of the wives, the parties to this action against whom recovery is sought.

The tentative agreement set out the proposed plan of amalgamation, and provides, in paragraph five, that the stockholders of the Mercantile National Bank who subscribed to the one hundred thousand stock in the German-American Mercantile Bank are to execute a good and sufficient guaranty to a trustee to be named by the stockholders of the German-American Bank, so as to insure "it" against loss upon the paper or obligations turned over by the Mercantile National Bank.

The stockholders of the German-American Bank were to execute a good and sufficient guaranty to a trustee to be named by the stockholders of the Mercantile National Bank who subscribed for the additional one hundred thousand stock of the German-American Mercantile Bank, under which they shall guarantee "said bank" against loss upon the paper then held by that bank.

If the tentative agreement were alone to be considered, it could hardly be doubted that the intention was to make the German-American Mercantile Bank the beneficiary of the agreement. In fact, the language here used is that the bank is to be guaranteed against loss; but, since the action necessarily is based primarily upon the reciprocal guaranty agreement, attention must be given to the language used in that contract. It consists of two parts, one part containing recitals and the other the obligations. In the recital part, which in effect recapitulates the plan of amalgamation or merger, there is some language which, if it stood alone, such as an expression, "guarantee to

them," would indicate that the guaranty was for the benefit of the stockholders subscribing to the one hundred thousand dollars' worth of the increased capital stock of the German-American Mercantile Bank. In the obligatory part of the contract it is recited, in the first paragraph, that, for and in consideration of the benefits accruing to us, and each of us, by reason of the matters and things hereinbefore referred to, and for a valuable consideration, the undersigned, and each of us, bind ourselves, in the manner therein set out, to make good any loss that may occur upon the paper held by the German-American Bank at the time of the amalgamation.

A method is provided by which to determine when the paper shall be considered a loss, and by which such loss may be collected from the parties signing the agreement. It is further provided that the signers of the agreement were to present their stock to a proper officer of the German-American Bank "and agree that such officers may indorse a memo therein impressing the same with the terms of this agreement." In pursuance of this provision, it is alleged that all the papers (notes) owned by the German-American Bank at the date the amalgamation was consummated, to wit, August 29, 1914, was, by the officers of the German-American Mercantile Bank, impressed with the terms of the guarantee agreement, there being placed upon all the paper and notes, including the paper received from the Mercantile National Bank, the abbreviation "Gr"; and the paper which both banks held at the time of the amalgamation was carried by the German-American Mercantile Bank in this form, and was held out to the state bank examiner as guaranteed paper.

The agreement further provides that "it is understood and agreed that the trustee representing the stockholders of the now Mercantile National Bank who

subscribed the additional one hundred thousand dollars of the stock is to account to the German-American Bank or its successor for all sums paid hereunder, less legitimate expenses thereto. That is, that the funds to be collected hereunder are to be collected for the use and benefit of the German-American Bank or its successors." Here is a direct provision that the money collected under this agreement is to be accounted for to the German-American Bank, and the funds so collected are "to be collected for the use and benefit of the German-American Bank." The paper covered by the guaranty was owned by the bank, which had a direct interest in its collection. The funds collected under the guaranty were to be paid to the bank. Under this state of facts, the bank was the direct beneficiary of the guaranty agreement. The stockholders, of course, who signed the agreement were also interested in keeping the paper of the bank good, but it was the bank as an entity which was primarily to be benefited by the collection. Indirectly, there would be a resultant benefit to the stockholders. Under the rule stated in *Tacoma Mill Co. v. Northern Pac. R. Co.*, 89 Wash. 187, 154 Pac. 173, these two agreements, being executed at the same time, should be considered together. If the reciprocal guaranty agreements were inconsistent with the tentative agreement, the provisions of the former, it may be admitted, would control. As already stated, under the tentative agreement, there can be no question but what the intention was to have the guaranty run to the bank and make it the beneficiary of the agreement. Reading the two instruments together, they do not appear to be inconsistent. There is nothing in the guaranty agreement which requires a construction that the beneficiary was to be the stockholders and not the bank. Language used incidentally in the recitals thereof cannot be held

to be controlling over the direct provision in the obligatory part. Even though the tentative agreement were disregarded, and attention was given only to the guaranty agreement, the result would not be different, because a proper construction of that agreement is that it is made for the benefit of the bank, and that the bank is the direct beneficiary thereof.

The guaranty agreement being made for the benefit of the bank, the question arises whether the state bank examiner may sue upon it. Under § 179 of Remington's Code, it is provided that every action shall be prosecuted in the name of "the real party in interest," except as is otherwise provided by law.

By a long line of decisions, which will be found collected in *Hart v. Bogle,* 88 Wash. 125, 152 Pac. 1010, this court is committed to the doctrine that, where one person, for a valuable consideration, makes a promise to another to pay the debt of a third person, such third person may maintain an action in his own name upon the promise, and against the promisor alone. The bank, being the direct beneficiary of the guaranty agreement, must be held to be the real party in interest. If the bank be the real party in interest, there can be no question that, after insolvency and the bank being taken over by the state bank examiner, that official may maintain an action upon the agreement. *Hanson v. Soderberg,* 105 Wash. 255, 177 Pac. 827; *Briscoe v. Hamer,* 50 Okl. 281, 150 Pac. 1101; *Montgomery Bank & Trust Co. v. Walker,* 181 Ala. 368, 61 South. 951.

The case of *Punta Gorda Bank v. State Bank of Fort Meade,* 52 Fla. 399, 42 South. 846, is very much like this, except that there the action was brought by the bank itself. The situation presented in that case and the holding of the court can be best understood by a liberal quotation from the opinion:

"It appears from the allegations of the declaration that the defendant and others owned the stock of the Punta Gorda Bank, which was a branch bank of the defendant. These parties thought it best for the banking interests of Punta Gorda to increase the capital stock of the latter bank from $5,000 to $15,000, and to incorporate it as a separate, independent institution. McAdow contemplated putting in the new bank the additional $10,000, or procuring others to do so, and the new bank was to take over the securities of the one it succeeded; but McAdow was uncertain as to the value of certain of the securities, especially the note of Hinkley for $4,500. To induce McAdow to go into the new bank, or induce others to do so, and put in the additional $10,000, the defendant and other stockholders of the branch bank at Punta Gorda executed a written instrument guaranteeing all the securities held by the branch bank at the face value against any loss by failure to collect said securities. This guarantee was executed on or about the 31st of December, 1898. In consideration of this guaranty $10,000 was added to the capital of the Punta Gorda Bank, and in pursuance of it the new bank, the plaintiff in this case, was organized and took over all the assets of the branch bank, including the Hinkley note, which in the meantime had matured, and Hinkley, with the consent of the defendant, had executed a renewal note, due on demand after date for $4,500 with 10 per cent interest. The Hinkley note proved valueless to the plaintiff, the new bank, and it sues on the guaranty. Construing this contract of guaranty in the light of the circumstances surrounding the parties, it seems to us that it was the intent of all the parties that the guaranty should so strengthen the financial position of the new bank as to induce McAdow to become interested in it, and therefore it was executed for the benefit of the new bank. McAdow and all other stockholders in the new bank were incidentally benefited by the guaranty, but its primary object was the benefit of the new bank. Taking this view, we think the plaintiff had the right to sue on this guaranty. It is not contended here that McAdow did not accept the proffered guaranty, or

that the defendant did not have notice of such acceptance, and the facts alleged very clearly imply, we think, that the guaranty was accepted by McAdow, and that the defendant had notice of the acceptance.

"The contention by the defendant in error is that no one but McAdow could sue on the contract of guaranty; that no contractual relations existed between the plaintiff and the defendant, and that no consideration is shown to support a contract between the parties, and, therefore, there is no valid contract. It seems to us that there was a clear benefit to be derived by the defendant and the stockholders of the branch bank from getting McAdow with his $10,000 into the new bank. It could have had no other effect than to give stability to the value of their stock, if it did not materially increase it, by enlarging the capacity of the bank for carrying on its business. This element of advantage was a sufficient consideration to support the contract. Furthermore, McAdow, by accepting the guaranty and putting his money, or procuring others to put in money, gave full consideration for the guaranty. *Ferst v. Blackwell,* 39 Fla. 621, 22 South. 892. If the contract was intended for the benefit of the new bank, as we think it was, then there can be no question that it has a right to sue upon it. *Wright v. Terry,* 23 Fla. 160, 2 South. Rep. 6; 7 Am. & Eng. Ency. Law (2nd Ed.), pp. 106-108 and notes. This was not the doctrine of the common law in a case like this and perhaps is not the rule in several American states, but under statutes like ours, authorizing the real party in interest to sue (section 981 of Rev. Stats. of 1892), we think the question is settled."

It has been suggested that the agreement of guaranty in that case was to the new organization, but even if this be true, it does not destroy the case as an authority. There can be little difference between the effect of such an agreement, and one which makes the bank the direct beneficiary of the proceeds.

The case of *Horstman Co. v. Waterman,* 103 Wash. 18, 173 Pac. 733, 1 A. L. R. 856, is relied upon as sus-

taining the respondent's contention that the bank was not the real party in interest, and that therefore the bank examiner has no right to maintain the action. But that case is distinguishable from the present in at least one material respect. There the creditor seeking to bring the action upon a guaranty agreement was not a party to the inducing consideration for the agreement. Here, before the amalgamation could take place, the bank must act, speaking through its stockholders. The bank, as an inducement and consideration for the amalgamation, increased its capital stock from one hundred thousand dollars to two hundred thousand dollars, changed its name from that of the German-American Bank to that of the German-American Mercantile Bank, reduced the number of its trustees to nine, and further provided that the agreements should be spread upon its records as a part of the minutes of the stockholders' meeting.

It is not the intention in that case to overrule the line of decisions of this court cited in *Hart v. Bogle, supra,* and adopt the rule of *Vrooman v. Turner,* 69 N. Y. 280, in modified form. There is a general reference to the early decisions of this court, in the opinion, but the line of cases referred to in *Hart v. Bogle* was not there mentioned. The *Vrooman* case is disapproved of in *Corkrell v. Poe,* 100 Wash. 625, 171 Pac. 522, and the rule of the cases cited in *Hart v. Bogle* is approved. But whatever effect may be given to the language in *Horstman Co. v. Waterman,* as already pointed out, upon the facts, that case is substantially different.

It has been suggested that the reciprocal guaranty agreements could have been rescinded and annulled with the consent and cooperation of the signers and trustees; but the rule is, that the parties to an agreement made for the benefit of a third party, if accepted

by that party, cannot themselves annul the contract by mutual releases. *McConaughy v. Juvenal,* 73 Wash. 166, 131 Pac. 851; *Tweeddale v. Tweeddale,* 116 Wis. 517, 93 N. W. 440, 96 Am. St. 1003, 61 L. R. A. 509; *American Central Life Ins. Co. v. Rosenstein* (Ind. App.) 88 N. E. 97; *Id.,* 46 Ind. App. 537, 92 N. E. 380; *Eitscheid v. Baker,* 112 Wis. 129, 88 N. W. 52.

Under that rule, the reciprocal guaranty agreement could not be annulled without the consent of the bank. It had assented to the agreements and was a party to the inducement and consideration which prompted them.

There are other questions suggested in the briefs, but we think that the questions already discussed and decided are controlling. Any further comment would unnecessarily extend this opinion, which is already unreasonably long.

The judgment will be reversed, and the cause remanded with directions to the superior court to overrule the demurrers.

Reversed.

HOLCOMB, C. J., BRIDGES, MACKINTOSH, and MOUNT, JJ., concur.

[No. 15362. Department Two. January 27, 1920.]

NETTIE HOWELL, *Appellant*, v. L. A. DUNNING, *Respondent*.[1]

DIVORCE (47-1, 70)—VACATION—FRAUD—DIVISION OF PROPERTY. A decree of divorce, awarding the wife but $3,000 of the community property, arranged upon the mutual agreement of the parties, will be set aside for the fraud of the husband, where it was induced by falsely representing that the community property, admittedly worth $16,000, was of the value of only $6,000, and by dissuading the wife, who was ignorant of the facts, from seeking legal advice; since it was his duty to make full disclosures and a fair division or put her on notice that they were dealing at arm's length.

DIVORCE (47-1, 70)—VACATION—FRAUD UPON COURT. A divorce, granted on a complaint filed one year previously, after condonation of all the charges, is a fraud upon the court which should be set aside, were it not for the fact of a second marriage and that innocent parties would suffer.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered October 18, 1918, dismissing an action to set aside a property settlement and to modify a decree of divorce, tried to the court. Reversed.

Moye Wicks and *Crandell, Williams & Crandell*, for appellant.

Plummer & Lavin and *W. H. Smiley*, for respondent.

TOLMAN, J.—Prior to April, 1914, the respondent and appellant were husband and wife, residing together as such in the town of Harrington, which had been their home for several years. At practically the same time, the respondent, through his attorney at Davenport, and the appellant, through her attorney at Spokane, each began a suit for divorce from the other, and shortly after the service of the respective com-

[1] Reported in 187 Pac. 365; 188 Pac. 30.

plaints, the parties composed their differences and resumed their marital relations. Nothing was done towards dismissing either suit, and both parties appeared to have considered that both actions were then abandoned. One year later, on April 15, 1915, trouble again arose between the parties, and it was agreed between them that they should go to Davenport and the husband should secure a divorce upon the complaint which he had prepared and served a year before, and then, or on the way to Davenport, the husband suggested that, in view of his liabilities and obligations, he could pay her but $3,000, and that only in installments, which would be her fair share of the community property, and the remainder of the property should become his separate estate; explaining in some detail, according to appellant's testimony, that he was heavily in debt, that the expenses of his business absorbed the profits, and that, after deducting the indebtedness, the community estate was not worth to exceed $6,000. The wife expressed a wish to have her attorney present, and to have the benefit of his advice, but the husband assured her that would be a useless expense, and that the proposed $3,000 settlement was all that the court would give her in any event. The husband denies that he told his wife that the value of the community property was only $6,000, but does not deny that the wife was entirely without business experience; had no knowledge of his business, its value and earnings: that he had enjoined upon her the strictest economy, because he claimed he was overburdened with indebtedness; had refused her requests for money for the same reason, and testified that he never, at any time, told her the value of their joint property, and seems tacitly to admit that the wife relied upon him to be fair in the matter. The wife, as she now claims, believing that the net value of the community property

was $6,000, and relying upon the husband's statement with respect thereto, consented to the decree awarding the husband the divorce and the custody of three of their five children, and awarding her the custody of the two remaining children, with a provision for $25 per month to be paid by the husband towards their support, and a property settlement of $3,000, payable $500 in cash and the balance in annual installments, with interest.

It is admitted that the husband's attorney undertook to act for both in arranging the property settlement and procuring the entry of the decree, and there is nothing in the record to indicate that the attorney acted in any other than a fair and impartial manner respecting the settlement. Neither is there anything to indicate that the attorney knew anything more of the value of the community property or the earning capacity of the business carried on by the husband than did the wife. And, acting for both upon a subject upon which they were apparently agreed, there appears to have been no reason for him to make such an investigation as might have been thought proper by one acting solely in the interest of the wife. After the entry of the decree, the wife went to California, and in the fall of 1916 first learned facts that indicated that she had been deceived in the property settlement, and thereafter brought this action, attacking only that portion of the decree which provides for the property settlement. From an adverse judgment below, she appeals.

Considering the nature of the case, the evidence is singularly lacking in conflict upon most of the vital points. As already stated, the respondent admits that appellant, while his wife, knew nothing about the details of the business; does not deny that he commonly refused her information when she inquired; and one

reading the record can hardly escape the conclusion, whether the husband's testimony is accepted or the testimony of the wife, that the wife relied absolutely upon the husband in this matter of the property settlement. This being so, in dividing that which belonged equally to both, but which the law placed exclusively in the possession and control of the husband, common justice, common fairness, and the law, all alike, require the husband to disclose fully the nature and value of the property to be divided and to make a fair division, or else put the wife on notice that they were dealing at arm's length and advise her to seek counsel and receive assistance from some other source. *Normile v. Denison, ante* p. 205, 186 Pac. 305. The husband, having dissuaded the wife from seeking the advice of her own attorney, must assume the same loyalty to her interest as her attorney would have shown, and whether his fraud be active or passive is immaterial.

That the amount paid to the wife was grossly inadequate is practically admitted. The husband himself testified in his own behalf as to the value of the community property at the time of the settlement, as follows:

"Q. Are you able to give at this time what your property, what you considered your property was worth at that time over and above your debts, over your liabilities? A. Why, I should imagine it was worth from $12,000 to $14,000. I wouldn't say whether it was worth that much or less. It could not have been worth over that."

While his bookkeeper, to whom he referred all questions of figures, and who, as he stated, knew all about his financial affairs, testified that the net assets of the firm in which the husband was a partner and half owner, for the year 1914, being the year immediately preceding the entry of the decree, were of the value of

$45,036.80, and the net profits of the firm for that year were $13,495.95. In 1915, the year the decree was entered, the firm made a net profit of $43,145.68, and in 1916 the net profit was $63,017.79. Admitting that these are book profits only, and that they might never be realized in full, still, at the beginning of the year 1917, respondent bought out his partner's interest in the firm and, according to his own testimony, paid him $35,000 therefor. The bookkeeper, who appears to have had a thorough knowledge of conditions, also places a value upon respondent's interest in the firm, at the time the decree was entered, of $25,000, which valuation respondent in no way disputes. Taking the bookkeeper's figures as to the value of that part of the community property invested in the partnership, and adding to it $2,000, which respondent himself fixed as the value of the community property not invested in the partnership, we have a community estate valued at $27,000, the whole of which the husband seeks to retain, after paying the wife, who, so far as appears, has done her full share in helping to acquire it, but a small fraction thereof. Respondent testified to community indebtedness outside the partnership of $10,149. While this appears only by his testimony, and there are some facts shown which cast doubt upon some of the items included, yet we are disposed, under the record, to allow this offset, this reducing the net value of the community property, at the time of the entry of the decree, to $16,851, the wife's half of which was $8,425.50. Deducting the sum of $3,000 already paid her, she should be allowed the difference of $5,425.50.

Appellant asks us, if we find the wife has been defrauded, to treat the community estate as undivided, order an accounting, and give the wife the benefit of the earnings subsequent to the entry of the decree.

This we cannot do, for the community was then dissolved; it was the purpose to then divide the community property, and the wife is entitled to receive what she would have received if no fraud had been practiced upon her, plus only legal interest during the time it has been withheld from her.

The record discloses a state of facts with reference to the entry of the decree of divorce by consent upon a complaint verified and served a year before, during all of which intervening time the parties had lived together as husband and wife, thus working a condonation of all matters charged, which amounted to a fraud upon the trial court, and cannot be permitted to pass here without comment and condemnation of all concerned therein. Neither party has attacked the decree except in the one particular of the property settlement, yet, did it not appear that appellant has remarried and has a child by her second husband, we should feel it our duty, of our own motion, to direct the trial court to set aside the decree *in toto;* but since to do so would be to punish the innocent with the guilty, we feel constrained to direct the trial court to permit the decree to stand as to the divorce, the custody of the children, and the provision for their support, but to modify it as to the property settlement as hereinbefore indicated.

Judgment reversed.

HOLCOMB, C. J., MOUNT, BRIDGES, and FULLERTON, JJ., concur.

[Decided March 1, 1920.]

PER CURIAM.—In the opinion heretofore filed in this case, it is said:

"The record discloses a state of facts with reference to the entry of the decree of divorce by consent upon a complaint verified and served a year before,

during all of which intervening time the parties had lived together as husband and wife, thus working a condonation of all matters charged, which amounted to a fraud upon the trial court, and cannot be permitted to pass here without comment and condemnation of all concerned therein."

While adhering strictly to the views thus expressed, it is but fair to say that none of the attorneys now appearing for respondent appeared for, or in any sense represented, him in the divorce action, a fact which should have been set forth in the original opinion. Our attention being called to the oversight, we make haste, in justice to respondent's present counsel, to say that we find nothing in the record reflecting upon them or either of them in the slightest degree.

[No. 15375. Department One. January 27, 1920.]

MINNIE BLODGETT, *Appellant*, v. MARY BLODGETT *et al.*, *Respondents.*[1]

MARRIAGE (8, 11)—COHABITATION AND REPUTATION—PRESUMPTIONS—CONTINUANCE OF ILLEGALITY. Residence and cohabitation in a state where common law marriages are recognized, after a former wife had obtained a divorce, does not legalize the prior void marriage of the husband or rebut the presumption of a continuance of the illicit relation, where neither of the parties knew of the divorce and their residence in such state was not permanent.

Appeal from an order of the superior court for Pierce county, Card, J., entered January 25, 1919, dismissing a petition for a new hearing, after granting an application for the removal of an executrix of an estate, upon sustaining demurrers to the petition. Affirmed.

Carroll & Stewart, for appellant.

Jay C. Allen, for respondents.

[1] Reported in 187 Pac. 340.

HOLCOMB, C. J.—On March 29, 1917, Alfred Blodgett died at Tacoma, Washington. He left no will, and on April 17, 1917, the appellant, claiming to be the widow of the deceased, was appointed administratrix of his estate. On September 10, 1917, the superior court for Pierce county, upon petition of respondent Mary Blodgett, mother of deceased, and after hearing upon the petition, entered a memorandum decision finding that appellant was never married to Alfred Blodgett; that, at the time appellant claims they were married, Alfred Blodgett was the legal husband of one Elsie Conahan; that there was no evidence that Alfred Blodgett and Elsie Conahan were ever divorced; that appellant knew that Alfred Blodgett could not legally marry; and that appellant had attempted to unlawfully dispose of the chief asset of the estate, and that it became the duty of the court to remove appellant as administratrix and appoint some person in her place; and the court thereupon appointed J. H. Gordon administrator *de bonis non.*

On March 14, 1918, appellant filed a petition for new hearing. The court, on April 17, 1918, sustained demurrers to this petition. On October 14, 1918, appellant filed an amended petition for new hearing. On October 15, 1918, the court sustained demurrers of Mary Blodgett and J. H. Gordon, administrator *de bonis non,* to this amended petition, and on January 25, 1919, entered an order dismissing the amended petition for a new hearing.

Passing the questions raised by respondents as to the right of appellant to an appeal, let us inquire into the allegations of the petition and amended petition for a new hearing. It appears from these that, on April 5, 1895, appellant and Alfred Blodgett went through the marriage ceremony as contracting parties, at Vancouver, B. C. At that time Elsie Conahan was

the living, undivorced wife of Alfred Blodgett. From April 5, 1895, to the time of the death of Alfred Blodgett, appellant and Alfred Blodgett lived together as husband and wife and held themselves out to the world as such. Most of this time was spent in the state of Washington, although for approximately twelve months of it, in three separate periods, they sojourned in the state of New York. Appellant alleges that, subsequent to the hearing and the order removing her as administratrix, she learned that the state of New York recognized and enforced common law marriages. She also alleges that, subsequent to her removal as administratrix, she learned that Elsie Conahan, in 1902, stated to acquaintances that she was, and claimed to be, divorced from Alfred Blodgett.

From all this, appellant seeks a rehearing on the theory, as we interpret her contentions, that, granting her marriage in British Columbia was void, the impediment to Alfred Blodgett entering into the marriage relation with her was removed in 1902 when Elsie Conahan was divorced from him; and when appellant and Alfred Blodgett, after 1902, lived in the state of New York as husband and wife, their relation passed from a meretricious one to a meritorious one, in that they became common law husband and wife, and having become husband and wife by common law in the state of New York, upon their return to this state, they continued in that lawful relation.

There is no allegation that, subsequent to 1902, when the impediment to the marriage of Alfred Blodgett to appellant was removed, a new contract of marriage was entered into by them. On April 5, 1895, Alfred Blodgett was totally incapable of entering the marriage relation with appellant and their relation was merely meretricious and unlawful.

The allegations of appellant's amended petition negative the fact that appellant, during the lifetime of Alfred Blodgett, had knowledge of the removal of the impediment to her marriage with him. There is nothing in her amended petition to show that he had such knowledge. If, then, neither of the parties were aware that they could lawfully enter into the marriage relation, or, expressing it differently, if both parties believed that their relation could not become a legal one, how then can the presumption of a continuance of the illicit relation be overcome? The fact that they could have entered into a lawful relation but did not, does not rebut the presumption of a continuance of illegality.

The mere fact that the parties at one time, when the impediment to their marriage may have been removed, lived in a state which recognizes common law marriages, does not change their relation. They still looked to the ineffectual ceremony at Vancouver as the beginning of their relation, and there is nothing in appellant's amended petition to show that they considered any other or a new beginning. Besides, their residence in New York was not alleged to be a permanent one, but the longest period of such residence was four and one-half months. In this respect the case is similar to the case of *Norcross v. Norcross,* 155 Mass. 425, 29 N. E. 506, wherein it was said:

"We are slow to believe that acts which in Massachusetts were illicit will be deemed matrimonial merely by being continued without any new sanction by residents of Massachusetts while transiently across the state line."

The case before us is stronger, in that here the record shows the parties knew their relation was illicit and believed it was incapable of being changed into a lawful one.

We have noted the cases cited by appellant holding that a meretricious relation may become matrimonial by the conduct of the parties evincing an intention to regard each other as husband and wife, but in the view we take of the case we do not regard them as having any bearing on the questions here involved.

The order of the superior court dismissing the amended petition is affirmed.

MITCHELL, PARKER, MACKINTOSH, and MAIN, JJ., concur.

[No. 15457. Department Two. January 27, 1920.]

MOWBRAY PEARSON COMPANY, *Respondent*, v. E. H. STANTON COMPANY, *Appellant*.[1]

CONTRACTS (4, 25)—MUTUALITY—CONSIDERATION—MUTUAL PROMISES. An agreement promising to sell ice at a certain price for one year to a certain dealer and to no other in consideration of such dealer's soliciting and delivering ice in a certain district, is entirely unilateral and unenforceable for lack of mutuality or consideration; since the dealer made no promise to solicit, deliver or buy the ice, and assumed no obligation.

CONTRACTS (6)—OFFER AND ACCEPTANCE—CONSTRUCTION. In such a case, indorsing the word "accepted" upon the contract does not constitute a promise on the part of the dealer to solicit, deliver or buy the ice.

CONTRACTS (24)—CONSIDERATION—MUTUAL PROMISES—INDEPENDENT CONSIDERATION. The carrying out of a unilateral contract to sell ice for one year to a certain dealer and no other, is not an independent consideration for an agreement extending the contract for the next year; since it could be withdrawn at any time.

Appeal from a judgment of the superior court for Spokane county, Oswald, J., entered March 25, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

[1]Reported in 187 Pac. 370; 190 Pac. 330.

Stephens & Jack, for appellant.

Lee & Kimball and *Ed B. Powell,* for respondent.

FULLERTON, J.—On March 31, 1916, the appellant, E. H. Stanton Company, executed and delivered to the Mowbray Pearson Company the following offer in writing:

"In consideration of Mowbray Pearson Company soliciting and delivering ice in Spokane north of the Spokane river to Olive street bridge and north of N. P. R. R. east of Olive street bridge and south of Cora avenue west of Division street, and Dalton avenue, east of Division street, E. H. Stanton Co. agrees to sell pure merchantable ice to Mowbray Pearson Company for $1.50 per ton at their plant for their requirements during 1916, and further agrees not to sell any other dealer for distribution in that district."

The parties acted under the terms of the offer for the year 1916, and at the end of that year the time thereof was extended to the end of the year 1917, by a writing indorsed thereon signed by both of the parties. When the respondent called upon the appellant to perform at the opening of the ice season in the second year, it refused, announcing that they would not comply with the terms of the writing, and refused repeated subsequent demands for ice, no ice at all being furnished during the extended period pursuant to its terms. The respondent thereupon brought this action to recover in damages as for a breach of contract, and recovered, on a trial had before a jury, in the sum of $2,321.29. The appellant suggested the invalidity of writing as an obligatory contract by a demurrer to the complaint, by its answer thereto after its demurrer had been overruled, by a motion for nonsuit made at the trial at the conclusion of the respondent's evidence, and by a motion for judgment notwithstanding the verdict. Its first contention in this court is that

the writing is void as a contract for want of mutuality.

It is elementary, of course, that a promise for a promise is a sufficient consideration to support an executory contract, and it is elementary, also, that a unilateral contract is supported by an independent consideration. But there is little or no disagreement among the cases that to sustain a contract on the principle of mutual promises, the promises sufficient to support such a contract must be mutual and concurrent, and obligatory upon each of the promisors; that a promise by one party to another to do a certain thing in case that other does some other thing, leaving it optional with the other whether he does the thing or not, is not an obligatory contract. This because it lacks mutuality; there being no promise for a promise. Cases from this court illustrating the principles are the following: *Brown v. Brew,* 99 Wash. 560, 169 Pac. 992; *Taylor v. Ewing,* 74 Wash. 214, 132 Pac. 1009; *Herrin v. Scandinavian-American Bank,* 65 Wash. 569, 118 Pac. 648; *Spokane Canal Co. v. Coffman,* 61 Wash. 357, 112 Pac. 383; *Parks v. Elmore,* 59 Wash. 584, 110 Pac. 381.

Nor will courts ordinarily inquire into the adequacy of the consideration. *Nelson v. Brasington,* 64 Wash. 180, 116 Pac. 629, Ann. Cas. 1913A 289. But a consideration in some form is essential; there must be either a benefit to the party promising or a loss or detriment to the party to whom the promise is made. *Jennings v. Dexter Horton & Co.,* 43 Wash. 301, 86 Pac. 576; 13 C. J. 311.

Turning to the writing under consideration, we can find in it no obligation assumed by the respondent. By its terms the appellant promised, in consideration of the respondent's soliciting and delivering ice within a certain described district, it would sell the respondent sufficient ice at a named price to supply the district,

but the respondent promised nothing. It neither promised to solicit and deliver ice in the district, nor promised, in case it did do so, to buy the ice it should sell from the appellant. The writing itself is therefore wholly unilateral. The promise is entirely upon the one side without any corresponding promise on the other.

Nor did the writing of the word "accepted" upon the contract alter its effect in this respect. This was merely agreeing to the terms of the writing. It did not constitute a promise on the part of the respondent to solicit and deliver ice in the district defined, nor did it constitute a promise to buy of the appellant the ice it might sell in the case it did solicit sales therein. A case in point is *Thayer v. Burchard*, 99 Mass. 508. There the defendants, who were operating a railroad for the benefit of bondholders, wrote to the plaintiffs, who were flour and grain dealers, that they would transport flour and grain between certain named places at $4 per ton, "this rate to continue in force until close of navigation, unless notice to the contrary." The plaintiffs answered, "We accept the proposition." This was held to constitute a mere offer on the part of the plaintiffs and not an obligatory contract, because the plaintiffs did not assume any obligation to furnish flour or grain for transportation, being at liberty to buy flour and grain or not, as they chose, and if they did buy any, to transport it on a road other than the defendants' if they saw fit, and hence would not support an action as for a breach of contract.

The respondent argues that there was an independent consideration for the promise, but nothing further is shown that the parties carried it out during the first year. This does not constitute an independent consideration. Being a promise on its part only, the appel-

lant was at liberty to withdraw it at any time, and since it did do so at the beginning of the second season, the respondent no longer had any rights thereunder and cannot recover as for its breach.

The trial judge should have sustained some one of the several challenges made to the sufficiency of the writing as an obligatory contract. The judgment is therefore reversed, and the cause remanded with instruction to enter a judgment in favor of the appellant to the effect that the respondent take nothing by its action.

HOLCOMB, C. J., BRIDGES, and MOUNT, JJ., concur.

ON REHEARING.

[No. 15457. *En Banc.* June 7, 1920.]

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court adhere to the opinion heretofore filed herein, and for the reasons therein stated, the judgment is reversed and the cause remanded with instruction to enter a judgment in favor of appellant to the effect that respondent take nothing by its action.

[No. 15462. Department Two. January 27, 1920.]

PETER HAUSKEN, *Respondent*, v. HODSON-FEENAUGHTY COMPANY, *Appellant*.[1]

APPEAL (322-1)—RECORD—ABSTRACTS—DISMISSAL. Insufficiency of the abstract is not ground for motion to strike it and to dismiss the appeal.

APPEAL (418)—REVIEW—FINDINGS. It cannot be said that findings are not supported where the testimony was in direct conflict, the court heard and saw the witnesses, and the probabilities were no stronger in favor of one than the other.

SALES (105)—IMPLIED WARRANTY—BREACH—DAMAGES. The sale of a tractor without inspection or test, with full knowledge of the particular purposes for which it was desired, impliedly warrants the fitness of the machine; entitling the buyer to recover damages for breach of warranty upon its inability to do the required work.

SALES (165)—WARRANTY—BREACH—MEASURE OF DAMAGES. The measure of damages for breach of implied warranty as to the fitness of a tractor for the purposes required, where the price was paid in advance and the machine retained notwithstanding the discovery of defects, is the actual damages which are the natural and probable result of the breach and fairly within the contemplation of the parties; and hence includes special damages incurred in doing the necessary work by teams, under immediate emergencies in the early part of the current season, where the seller was notified of the defects and attempted to remedy them; but not to similar losses in the ensuing year.

SALES (164-1)—WARRANTY—BREACH—DAMAGES—EVIDENCE—SUFFICIENCY. Upon an issue as to the damages from breach of warranty of a tractor, sold for $800.91 and claimed to be worthless, a prima facie case as to the value of the machine at the time it was sold is not necessarily made out by testimony of an apparently hostile witness, formerly defendant's agent, that at the time of the trial (two years after the sale), it was worth only the price of junk, which witness thought was $20 a ton and that it weighed about 5,000 pounds.

Cross-appeals from a judgment of the superior court for Spokane county, Hurn, J., entered March 5, 1919, upon finding nominal and special damages, in an

[1] Reported in 187 Pac. 319.

action on contract, tried to the court. Affirmed on plaintiff's appeal; modified on defendant's appeal.

Tustin & Chandler, for appellant.

Turner, Nuzum & Nuzum, for respondent.

HOLCOMB, C. J. — The court below found for the plaintiff on his cause of action and rendered judgment thereon awarding special damages in the sum of $225, and nominal damages in the sum of $1, from which judgment both parties have appealed.

Defendant, which is the principal appellant, was a dealer in tractors in Oregon and Washington, and not a manufacturer. Respondent is a farmer of Spokane county, Washington, and about seventy years of age. The tractor in question, previous to its purchase by plaintiff, had been looked at superficially by him. It had been examined by the president of the appellant, Mr. Feenaughty. Plaintiff claims defendant represented it as a new tractor. At the trial Feenaughty, who denied any affirmative representations as to the quality of the tractor to plaintiff, admitted that the tractor was, "so far as he knew, a new machine"; that it had been sent by his concern to an agent or dealer in Idaho and used for demonstration purposes, and kept in a shed or barn so that it was not protected from the weather at the front end, and the paint was off the front end and there were two radiator pipes that had been damaged and it looked in bad shape. It had then been sent to Spokane and an attempt had been made to sell it to a Mr. Powell, who rejected it on account of its appearance and returned it to defendant. The sale to plaintiff, made shortly thereafter, was for cash, then and there paid, and not by sample, or subject to inspection or test, and it was thus an *executed* and not an *executory* sale. Defendant claims that it

was a second-hand machine, as shown by the evidence, and therefore the probabilities are that no express warranties would have been or were made as to its condition, and the rule is that no warranty can be implied. But it is evident that the machine was not considered as a second-hand machine by defendant and was not so represented to or received by plaintiff. Feenaughty testified that it was not mentioned as a second-hand machine, that he told plaintiff that it was a machine badly mussed up. On account of its appearance, it was sold to plaintiff at fifteen per cent from the list price.

Plaintiff claimed a recovery on warranties, both express and implied, as to the adaptability of the machine to do his work, its horse power and general qualities, arising from the information made to the seller of the exact amount of work it was desired to do and the reason why plaintiff desired a tractor on his farm, and that he had sold his horses and was not able to follow a plow and drive horses at his age, but that it was necessary to have a tractor. Besides asking for general damages in the sum of $800, plaintiff sought special damages, basing that right on the evidence that the use to which the tractor should be put was specifically explained to defendant, the necessity for its doing the work emphasized to and understood by defendant, and that the damages resulting to plaintiff as a consequence of its failure to do the work were within the contemplation of the parties and therefore recoverable.

The complaint alleges, and there is competent evidence to support the allegations, that defendant sold the tractor to plaintiff at Spokane for use on plaintiff's farm (which use was then and there disclosed to defendant), and necessary parts to be used in connection with the tractor, for the sum of $800; that defendant then and there, and as part of the consideration for

the purchase of the tractor by plaintiff, warranted that the tractor possessed eight horse power at the draw bar and sixteen horse power at the belt, and that it would pull three mould board plows and three or four disc plows, and that it possessed the power and adaptability to do all work required in plowing, cultivating and harvesting the crops on plaintiff's farm, and possessed the power and ability to do all work; that the tractor did not possess eight horse power at the draw bar nor sixteen horse power at the belt; that it would not pull three mould board plows or three or four disc plows, and that it possessed neither the required power nor adaptability to do the work required in plowing, cultivating and harvesting the crops on plaintiff's farm, and that it was so defective in design, build and workmanship that it was deficient in power for plowing and harvesting; that it was unsafe to operate because of a defective brake system; that at times it would not start at all, or run at all; that it could not be turned within a reasonable compass, and that, instead of having eight horse power at the draw bar, it would not do the work of two good horses, all of which made the tractor almost completely useless for farm work. It is then alleged that plaintiff suffered special damages in the sum of $800 during the years 1917 and 1918 by reason of having to hire men and teams to do the work that the tractor would not do, and by reason of injury to his crops in each of those years because of necessary and unavoidable delay in procuring men and teams to do his farm work, for which damages were demanded in the total sum of $1,600.

All the allegations of the complaint were put in issue except the sale of the tractor to plaintiff, which was alleged to be for the sum of $742.

Plaintiff first moves to strike the abstract of defendant and dismiss its appeal. We do not think this motion well taken, and it is therefore denied. *Wishkah Boom Co. v. Greenwood Timber Co.*, 100 Wash. 472, 171 Pac. 234.

Appellant demands reversal of the judgment upon three grounds: (1) The testimony preponderated in favor of the defendant; (2) that, even if there had been implied warranty in the sale of the tractor, the special damages allowed were not proper; (3) that there was no implied warranty in the sale of the machine under the circumstances of this case.

As to the first contention, the positive evidence of plaintiff with some corroboration as to the condition and performance of the machine and the reasonable probabilities surrounding the transaction was contradicted in chief by the positive evidence of Feenaughty as to most of the facts, and the probabilities are nowhere stronger in favor of defendant than in favor of plaintiff. The court having seen and heard the witnesses and found in favor of plaintiff in the main, we cannot say now that the testimony preponderates in favor of defendant. The court found, among other things, that no special warranties were made by defendant to plaintiff concerning its tractor previous to the time plaintiff purchased the tractor, and that there was an implied warranty accompanying the tractor that it was possessed of sufficient power and adaptability to do the work on plaintiff's farm, and that it would pull three mould board plows or four disc plows, and that it possessed power and ability to do all work required in properly plowing, cultivating and harvesting the crop on plaintiff's farm, and that it would run and possessed the power and ability to do his work; that the tractor did not possess sufficient power to pull three mould board plows or three or four disc plows,

or any more than one mould board plow and one disc plow, or do plowing and discing at the proper depth and as good farming dictated; that plaintiff experienced considerable difficulty in starting the tractor when using it on his farm, from the time the same was purchased down to the time of the commencement of this action; that the difficulties were experienced probably because the magneto was either not properly adjusted or timed, or not properly constructed or was defective; that it would take from one to three hours to get the tractor started, and when it was started it would not continue to run, but would stop of its own accord without any fault of plaintiff; that the tractor would not turn in the soft plowed ground because of its construction; that plaintiff also had difficulty in operating said tractor on his farm in connection with plowing, and that it did not possess sufficient power to plow plaintiff's land when the plows were set at a depth necessary to do good farming.

Upon these findings as to the facts concerning the sale and the defects of the tractor, we have less difficulty in deciding the rule of liability than the right to recover damages as prayed and allowed. This was not a sale by sample nor an executory sale to be made after inspection, and therefore not governed by many of the authorities cited by defendant. Neither did plaintiff, upon discovery of the defects and the failure of defendant to remedy them, upon notice thereof, promptly rescind the sale and disaffirm the contract and sue for a return of the purchase price, and it is that situation which gives us difficulty.

As to the right of recovery under such implied warranty as the court found under the facts, there can be no doubt. A warranty is a statement or representation made by the seller of goods contemporaneously with and as a part of the contract of sale, though collateral

to the express object of it, having reference to the character, quality, or title of the goods, and by which he promises that certain facts are or shall be as he represents them. A warranty is express when the seller makes an affirmation with respect to the article to be sold, pending the treaty of sale, upon which it is intended that the buyer shall rely in making the purchase. A warranty is implied when the law derives it by implication or inference from the nature of the transaction, or the relative situation or circumstances of the parties. 35 Cyc. 365, 366.

And so, being a collateral undertaking only to the contract of sale, a warranty of the same effect, whether express or implied, will give rise to the same liability. An implied warranty is one which, not being expressly made, the law implies by the facts of the sale. An implied warranty of fitness will arise if the article is purchased for a particular purpose of which the buyer informs the seller, the rule applying especially if the seller is a dealer in the article, or the manufacturer thereof. 35 Cyc. 399; Benjamin, Sales (2d ed.), § 661; *Morris v. Bradley Fertilizer Co.*, 64 Fed. 55. And it being a part of the consideration of an executed sale, necessarily survives acceptance of the article.

So that where, as here, the court found that the facts of the sale were such that the defendant, having full knowledge of the kind and quality of tractor desired to be purchased by plaintiff and the particular purposes for which he desired it, whether defendant expressly or affirmatively warranted the tractor to fulfill those requirements when he knew and understood the requirements and sold the tractor, not after requiring inspection and test, but selling it for such use and requirements, thereby impliedly representing that the machine there under consideration was the machine which plaintiff required and desired, there was, as the

court found, an implied warranty, and upon that plaintiff would be entitled to recover damages for the breach of the warranty.

Plaintiff, however, receiving the tractor about March 30, 1917, commenced to use it on his farm about the eighth day of May, 1917, as early as the ground and season permitted, and found it defective. After making some effort to remedy the defect and use it, he notified the agent at Spokane, who sent a man to his farm. The man made some adjustment and left it. Plaintiff thereafter attempted further to use it and found it still defective, and, as shown by his testimony and some corroboration, the defects and incapacities of the tractor to fill the requirements of plaintiff, for which it had been purchased, were as found by the court.

The court further found that, during the year 1917, on account of the defects and failure of the tractor, plaintiff was compelled to hire men and teams to do the farm work which should have been done readily by the tractor had it been in proper condition; that the expense in that year for men and teams was $150; that the expense for similar purposes in the year 1918 was $75.

The general rule as to the measure of damages for defects in quality of the goods purchased where the price has been paid in advance and the goods delivered are of such inferior quality as to warrant their rejection, is that the buyer may recover the amount paid, unless he retains and continues to use the goods for his own benefit. 1 Sutherland, Damages (4th ed.), 311, 317. The price may, however, be recovered if the goods were accepted upon the promise that defects would be remedied and this could not be done, or if, on notice of defects, the article is removed by the seller. 35 Cyc. 604. In this case the price was paid

in advance and the article delivered of an inferior quality so as to warrant its rejection upon discovery thereof, but the buyer retained it and continued to use the article for his own benefit during the second year, 1918.

It is also the general rule that, on a breach of the sale by the seller, the buyer is entitled to recover the actual damages which he has sustained, which are the natural and probable result of the breach and may fairly be said to have been within the contemplation of the parties, and although no actual damages are shown, the buyer may, if there has been a breach of the contract, recover at least nominal damages. He is not, however, entitled to recover more than the actual damages sustained, or which, in the absence of special circumstances known to the seller at the time the contract was made, are not the natural and probable result of the breach and not reasonably within the contemplation of the parties. And if, as it was his duty to do, the buyer has been able to lessen his damages, he can recover only the damages actually sustained. 35 Cyc. 633; *Eichbaum v. Caldwell Bros. Co.*, 58 Wash. 163, 108 Pac. 434; *Wright v. Computing Scale Co.*, 47 Wash. 107, 91 Pac. 571. Of course, special damages, in view of these rules, are allowable in any case of breach of the warranty by the seller, where such special damages are reasonably within the contemplation of the parties and are the proximate and actual result of the failure to deliver such article as is warranted to be delivered. In this case, since the tractor was sold by defendant for the purposes made known to it by plaintiff, and it was notified of the defects during the early part of the season of 1917 and attempted to remedy them, we see no reason why special damages incurred in the summer of 1917 in procuring the teams and men to do the plowing and cultivating desired and

required of the tractor should not be allowed, because then nothing else was possible. An immediate emergency then existed, caused by the failure of the tractor to perform as relied upon. But not so for successive seasons or years. He could not retain the defective machine, attempt to use it, and increase or duplicate his damages. When the defect was not remedied upon notice and the seller did not retake the machine, we know of no rule in such case as this that will allow damages for the ensuing season, or year after year, as being the proximate and actual result of the defects of the machine known to the purchaser the preceding season and not remedied. Plaintiff is certainly not entitled to the cost of procuring men and teams in the season of 1918 for his plowing and cultivating. The item of $75 should, therefore, be stricken from the judgment.

Plaintiff also appeals from the refusal of the court to award him damages on account of the purchase price, found to be $800.91, such damages being proven in the sum of $750.91. It is contended that the value of the tractor, at the time of the trial, was simply that of junk, and that junk was worth about $20 a ton, and that the tractor weighed about 5,000 pounds. The trial judge held that the value of the tractor must be proven as of the day of the purchase. Plaintiff contends that the tractor was of the same value at the time of the trial as at the time of the purchase, that its use was negligible, and that the things that were inherently bad in it existed at the time of the purchase; and that all of these things being before the court, the testimony of the value of the tractor was sufficient to entitle him to an award of general damages of $750.91, which the evidence showed plaintiff had been damaged; perhaps not very strong, but sufficient to make a *prima facie* case as to the damages, and not being rebutted by de-

fendant, was sufficient to entitle the court to award the plaintiff such damages. We do not think this evidence sufficient to make a *prima facie* case, if the court did not so consider it in weighing the evidence mentioned. The witness testified that the tractor was worth, at the time he was testifying, "just the same as any 8-16 tractor we ever had there [witness having previously been an agent or employee of defendant], and that is just the price of junk"; that he did not know the price of junk, but thought it about $20 a ton, and thought that the weight of the tractor was about 5,000 pounds. The evidence bears on its face some evidence of hostility, bias and exaggeration, did not relate to the time of the purchase, and the court was entirely justified in disregarding it.

The judgment will therefore be affirmed on plaintiff's appeal, and modified on defendant's appeal to the extent of eliminating $75 from the judgment.

Defendant will recover costs on this appeal.

FULLERTON, MOUNT, BRIDGES, and TOLMAN, JJ., concur.

[No. 15487. Department One. January 27, 1920.]

A. J. WALCOTT *et al., Respondents,* v. J. B. WOOD, *Appellant.*[1]

BILLS AND NOTES (138, 146)—ACTIONS—WEIGHT OF EVIDENCE—FRAUD—DURESS. In an action to cancel a note, executed under threat of arrest for theft of defendant's money, the evidence is insufficient to sustain a counterclaim for the amount of the note, where upon the issue as to its appropriation, plaintiff positively declared her ignorance and there was nothing but a flimsy showing, consisting mostly of pure suspicion, to indicate that she had taken it.

Appeal from a judgment of the superior court for King county, Smith, J., entered March 19, 1919, upon findings in favor of the plaintiffs, in an action to cancel a promissory note, tried to the court. Affirmed.

Gay & Griffin, for appellant.

Chadwick, McMicken, Ramsey & Rupp and *J. E. Peterson,* for respondents.

MITCHELL, J.—This is an appeal from a judgment canceling a promissory note for $350, executed and delivered by respondents to appellant, upon the ground of want of consideration and because of duress, and denying appellant relief upon his counterclaim, wherein he sought judgment in said sum of $350, alleged to have been stolen from him by respondent Phoebe A. Walcott.

The trial was without a jury. There are six assignments of error, the first five of which, as counsel for appellant admit, may fairly be considered under one head, viz.: "Did Mrs. Walcott find and appropriate Wood's purse and contents, Saturday, January 25, 1919?" The question presents the trial of facts, and although a careful consideration of the evidence and

[1]Reported in 187 Pac. 375.

the arguments of counsel lead clearly to the conclusion reached by the trial court, we consider it appropriate, because of the gravity of the accusation and of the making of it, to set out the essentials of the evidence and our opinion thereon.

In substance, the case presents the following facts: Respondents are husband and wife, and for about ten years have lived upon and cultivated a small farm of fifteen acres belonging to them at or near Winslow, Kitsap county, Washington. They were in comfortable circumstances. He was sixty years of age and she was sixty-four. They lived alone and, it appears, did very little visiting. Appellant was thirty-nine years old and for two and one-half years had been an itinerant salesman, selling and delivering teas, spices, coffees, etc., for the Grand Union Tea Company, with headquarters at Seattle. For two years he had stopped as a guest at respondents' home, one week out of every month, that is, from Monday to the following Friday or Saturday, spending the nights and taking breakfast and supper there, for which he paid. Just prior to his present employment, appellant had been engaged for twelve to fourteen years in the hotel business at San Francisco, Los Angeles, and Houston. In January, 1919, he took with him on his route one Phillips (the father of the manager of the tea company), who was to take the place of appellant while the latter took a vacation of one or two months. They stopped at the Walcott house for the week ending January 25, 1919. On leaving Saturday morning for their day's work in the vicinity, appellant claims he left his purse, containing $356 in money and checks, in the bedroom; that it was not found by or delivered to him upon his return that afternoon; and he accused Mrs. Walcott of stealing it. More specifically, appellant and Mr. Phillips slept in the same bed Friday

night, appellant in front. He says that, in undressing, his purse dropped out of his trousers pocket onto the floor, under or near a chair, and upon Mr. Phillips' speaking of it, he replied he knew it, that it was as safe there as anywhere; that, on dressing and leaving the room the next morning before his companion did, he noticed the purse on the floor and forgot to pick it up. He did not go into the bedroom again until after he returned from his day's work. He says he had other money about his person.

Mr. Phillips said appellant had money, but that he did not know the amount; that, when they were preparing for bed Friday night, he noticed and spoke of appellant's purse falling to the floor, and that appellant replied it was safe there. He got the impression appellant was not going to leave the purse on the floor. He retired to the bed before appellant did. He did not know how much money the purse contained, or that it contained any. Upon arising and dressing the next morning, after appellant had left the room, he did not think of, nor did he see, the pocket-book. At the breakfast table there was some discussion, the details of which need not be given, reasonably resulting in Mrs. Walcott's not understanding they wanted supper that evening, but that they would leave by boat, at six o'clock, for Seattle. Appellant and Phillips traveled in an automobile. On making their first call on Saturday, about two miles from the Walcott house, appellant told Phillips he had left his purse on the floor in the bedroom. Upon being advised and urged to go back then and get it, he declined. In their work during the day, frequently they were not together. They returned to the Walcott house about five o'clock that afternoon, they say, while she says it was about four o'clock. Appellant rushed through the house into the dining room, and, addressing Mrs. Walcott,

who was sitting in a rocking chair reading, asked her if she had seen anything of his purse lying on the bedroom floor, and she answered: "No, Mr. Wood, I haven't been in your room all day." Appellant went into the bedroom alone and in a few minutes called to Mrs. Walcott that his purse was gone. Then she and the others made a search of the room without finding the purse. Leaving without supper, on the six-o'clock boat for Seattle, appellant told them he would be back on Monday and give them until then to see if they could not find it. He and Phillips went back on Monday, when appellant first said to Mr. Walcott that his wife had the money. The accusation hurt Mr. Walcott's feelings. Appellant then told both of the respondents that the only thing he could do was to get a search warrant and a warrant for her arrest, unless they wanted to settle. She positively denied the theft.

Appellant then went to Port Orchard, swore out an arrest warrant and a search warrant, and on Tuesday, with a deputy sheriff, appellant and Phillips went back to the Walcott home. On the way appellant told the officer if he could get the money not to arrest Mrs. Walcott. Leaving them near the house, the officer went in, told respondents who he was, the purpose of his call, and that he would have to search the house and the person of Mrs. Walcott. She objected to the search of her person by the officer, and then the officer said he would have a neighbor lady search her. He also told her he would have to take her to Port Orchard before the justice of the peace, who would fix the amount of bail bond. He said she was excited, and after talking awhile about the course of such cases, the officer told her he could not tell how much it would cost them; that he had known people to spend two or three thousand dollars on a dog. Finally Mrs. Walcott asked if there wasn't some way to settle the matter, and said

she would like to see Mr. Wood. The officer then told her he could get him, and went out and called in Wood and Phillips. Upon inquiry, appellant told them the matter could be settled for $350 in money. They advised him they had no money. Further conversation resulted in the execution and delivery of the note in suit, due in one year from its date. There was some talk also about later giving a mortgage, but that was not done.

Appellant claimed the money lost was his own, and admitted that at that time he owed his employer the sum of $450. It may be stated here that all the testimony shows Mrs. Walcott was feeble and for some months had suffered from the "flu," and probably a relapse of it, having been unable, during her severe illness, to procure proper care. She and her husband were alarmed for her health by the threat to take her to jail at that time of the year, and so stated to the officer and appellant in proposing to settle the matter. The officer frankly stated that, on the day he called to arrest her, in his opinion she was a seriously sick woman. He further testified that, when he first got to the door, she was greatly excited, so much so that, to use his own words, "I kinder felt as though I had the right party. I formed that opinion." But in cross-examination he frankly testified:

"No, when I first came to the door and she was greatly excited I didn't know that Mr. Wood had threatened an arrest. Yes, that would have explained her manner; I can see why she would be in that condition and don't attach any importance to it."

Mrs. Walcott testified that, at all times when appellant was staying at her house, her general rule was not to make up his room and bed until after supper. It has been noticed that she did not understand the two men would take supper at her house that Satur-

day; for she had heard Mr. Phillips say he intended taking supper with his family, and appellant at that time said he did not care where he took his supper. There is no doubt those things were said at the breakfast table and easily account for her understanding of the matter. Appellant says it came over his mind his purse was gone as soon as he stepped on the porch that evening.

"The reason I had a feeling, when I stepped on the porch, that the purse was gone forever, was the way things were. It just came over my mind that the purse was gone. There was no dinner ready, which was supposed to be ready at five o'clock, and most generally when I had come she would come to the door unless she was busy. This time she sat in the chair. It was just her attitude and manner. . . . Yes, one of the reasons I suspected her was the bed wasn't made up."

He testified that when he was to stay at her house at night he usually got in from six to eight o'clock, and she said, except on Mondays, he usually got in from seven to eight o'clock. On this Saturday she says he got in at four, and he says at five o'clock.

Mr. Phillips testified:

"When we came to the door that night and saw that the table had not been arranged and it didn't look like a meal was coming up on time, and her not having made up the bed, the idea struck me as rather queer."

Again, after referring once more to dinner not being ready, he said:

"Another thing was leaving the bed untouched, and it seemed that she was making it evident she had not been in the room that day; that is the way it impressed me, that she wanted to make up evidence to make it show she had not been in the room."

Mrs. Walcott, notwithstanding her feeble condition, had on that Saturday done the ironing, cleaned her house, other than the bedroom, as usual, gotten two

meals, helped her husband put in some plumbing on the back porch, attended to her chickens and other small chores in and around the house, and taken a nap of about twenty minutes. She said she was tired at the time of their arrival. Because, upon being questioned on two or three occasions, she became somewhat mixed as to whether one or more of those things had occurred in the morning or afternoon, and as to the exact length of time taken, or because in some one recitation one or more of those things was not mentioned as constituting her day's work, appellant undertakes to distort such discrepancies into inculpatory acts; and yet, at the trial of this case, which occurred on the thirty-seventh day after the note in suit was given, appellant, ripe in experience and keen from constant active contact with the traveling and trading public for fifteen years, could not remember, or at least testified he could not name, a single person, other than one, from whom he had within a few days prior to and on the 25th day of January, taken about $75 worth of small checks in selling his goods. He had testified there was about that much in small checks in his purse, and that he had made no effort to get duplicates, to have payment stopped on any of them, or even to ascertain who the persons were that had given the checks.

Mrs. Walcott, needless to say, positively declared her innocence of the theft, and with her husband testified that their only purpose in signing the note was to save her from the threat of enforcement of the criminal arrest warrant. They were required to pay five dollars to the deputy sheriff, who promptly reported the same to the justice of the peace who issued the warrant. Often, during the last two years, appellant had left money with Mrs. Walcott for safe-keeping during the day as he went out to work.

It will not do, even by the rule of the burden of proof in the trial of civil actions, upon such a flimsy showing, consisting mostly of pure suspicion, to find this woman guilty of so great a wrong. The evidence preponderates the other way.

It is deemed appropriate, as expressive of our conclusions and views of this matter, in taking leave of this phase of the case, to notice an incident that took place while the deputy sheriff was writing the note involved in this suit. The others present at that time were respondents, appellant and Mr. Phillips. Mrs. Walcott testified:

"Q. Explain just how you came to take hold of Mr. Wood's hand and where you were? A. I was sitting right by Mr. Wood at the table, so near him, and when they were making out the note I said, 'Oh, Mr. Wood, why did you do this to me. I haven't your money.' 'Will you let me repeat it? Q. Yes, repeat all you want? A. I said, 'Oh, Mr. Wood, you must know I was sick all week.' He said, 'Yes.' I said, 'Why did you do this to me?' I said, 'Why did you do this to me. I always thought a great deal of you as a gentleman.' He didn't say nothing. Q. Did you touch his hand at that time? A. Yes, sir. I had my hand on his or inside his, I don't know which."

It is proper to mention there is no suggestion or intimation in this whole record to indicate that either Mr. Walcott or Mr. Phillips had anything to do with the loss or theft of appellant's purse, if it was lost or stolen.

The only other assignment of error was the denial of the motion for a new trial. An examination of the record fails to show any abuse of discretion on the part of the trial court in that respect.

Judgment affirmed.

HOLCOMB, C. J., PARKER, and MAIN, JJ., concur.

[No. 15500. Department Two. January 27, 1920.]

THE STATE OF WASHINGTON, *Respondent*, v. D. B. BURCHAM, *Appellant*.[1]

CRIMINAL LAW (327)—TRIAL—TAKING EXHIBITS TO JURY ROOM. In a prosecution for the unlawful possession of whiskey, it is not error to allow the jury to take to the jury room bottles of whiskey introduced in the evidence as exhibits and to smell and sample the contents during the deliberation; the matter ordinarily being within the discretion of the trial court.

SAME (347, 348)—NEW TRIAL—MISCONDUCT OF JURORS—SAMPLING WHISKEY EXHIBITS. The denial of a motion for a new trial for misconduct of the jury in sampling and drinking whiskey which, as an exhibit in the case, was taken to the jury room, is not prejudicial error where it does not appear that any of the jurors were under the influence of liquor.

SAME (212)—TRIAL—TESTS—SAMPLING WHISKEY. In a prosecution for the unlawful possession of whiskey, any sampling and testing by the jury should be in the presence of the court at the trial, and not in the jury room on deliberating upon the verdict; but the same is usually unwise and unnecessary.

Appeal from a judgment of the superior court for Kittitas county, Davidson, J., entered January 11, 1919, upon a trial and conviction of violating the prohibition law. Affirmed.

Eugene E. Wager, for appellant.

Arthur McGuire, for respondent.

BRIDGES, J.—The appellant was charged by information with unlawfully having in his possession more than two quarts of intoxicating liquor other than beer. The jury returned a verdict of guilty. A motion for a new trial was denied. From the judgment upon the verdict, this appeal is taken.

At the trial the state introduced in evidence some twenty-four pint bottles, alleged to contain whiskey.

[1] Reported in 187 Pac. 352.

All of these except one were under seal and had not been opened. The appellant contends that the evidence was insufficient to show that the contents of the bottles, or at least more than two quarts thereof, were intoxicating liquor other than beer. It would not serve any useful purpose to here recite the testimony on this question; suffice it to say that a careful examination of the whole record convinces us that there was ample testimony tending to show that these bottles contained whiskey.

It is next contended that it was error for the court to send these exhibits to the jury room and allow the jury to keep the same while it was deliberating on its verdict. It has been almost the universal practice in this state for the trial court to allow the jury to take with it, while deliberating on its verdict, any and all exhibits introduced in the case, other than depositions. This court, in a number of cases, has held that it is not error for the trial court to send to the jury, while deliberating on its verdict, exhibits which have been duly received in evidence. Rem. Code, § 351; *Doctor Jack v. Territory,* 2 Wash. Terr. 101, 3 Pac. 832; *State v. Webster,* 21 Wash. 63, 57 Pac. 361; *State v. Baker,* 67 Wash. 595, 122 Pac. 335. The court, therefore, did not commit prejudicial error in sending to the jury the exhibits in this case.

During the argument to the jury a dispute arose between the attorneys whether there was sufficient testimony as to the contents of the bottles to take the case to the jury. During this dispute the court, in the presence of the jury, said that the bottles would be with the jury while it was deliberating on its verdict and it could convince itself in any way it chose whether the contents thereof consisted of whiskey. The appellant contends that the court erred in telling the jury, in substance, that it could smell and sample the con-

tents of the various bottles for the purpose of determining whether they contained whiskey. It would not have been prejudicial error to have allowed the jury to smell and taste this liquor during the progress of the trial, for the purpose of assisting it to determine the nature of the liquor. If that would not have been error, it was not prejudicial error to allow the jury to take the bottles to the jury room and, while deliberating on its verdict, smell and sample the contents thereof for the like purpose. In other words, we hold that it was not necessarily prejudicial error for the court to send such exhibits to the jury or to permit the jury, while deliberating on its verdict, to smell and sample the contents of the bottles for the bona fide purpose of determining whether the contents thereof consisted of whiskey.

A more serious question is raised by the appellant in his contention that the jury, while deliberating on its verdict, abused its discretion by drinking considerable quantities of the liquor. The affidavits of practically all of the jurors were obtained concerning the amount of the liquor consumed by the jurors while deliberating on their verdict. The affidavits of some of the jurors would indicate that considerable and unnecessary portions of the liquor had been consumed by the jury, but the affidavits of most of the jurors are to the effect that only about five of the bottles were opened by them and but a small portion thereof was consumed by the jury, and that this was done by tasting for the purpose of determining whether it was whiskey. There is no affirmative showing that any of the jurors were under the influence of intoxicating liquor, either while deliberating on the verdict or when the jury came into court with its verdict. On the contrary, a majority of the jurors made affidavits to the

effect that at no time was any juror under the influence of intoxicating liquor. The clerk of the court, who personally knew most of the members of the jury, made affidavit that none of them was under the influence of liquor. The court, who received the verdict, stated that he was acquainted with most of the jurors and was of the opinion that none of them was under the influence of liquor. Under this state of the record, we cannot say that the appellant has been prejudiced. The trial court was in better position than we to observe the jurors and to note the amount of liquor they had partaken of, and whether or not they had consumed all the liquor that was missing, or whether there had been an opportunity for some of it to disappear in other ways, and whether any juror was under the influence of strong drink. He denied the motion for new trial; we cannot say he erred therein.

However, we feel that it is our duty to discourage the practice of permitting the jury to have with it, while deliberating on its verdict, large quantities of intoxicating liquor. This appeal shows the dangers of that practice. Ordinarily, there is no necessity therefor and no good can be accomplished thereby. Whether or not the court should send such exhibits to the jury is ordinarily a matter of discretion. If the court is of the opinion that it is wise that the members of the jury should determine for themselves whether or not certain liquid is intoxicating liquor, they should be required to so determine by smelling and tasting during the course of the trial and in the presence of the court. Ordinarily, however, the state can furnish, by other means, ample testimony to show whether a liquor is intoxicating or otherwise, and usually it is neither necessary nor wise for the jury at any time to sample the liquor.

In this case we feel certain that the court did not commit any reversible error, that the jury was not guilty of such misconduct, if any, as that the appellant was prejudiced thereby or deprived of a fair trial. The judgment is affirmed.

HOLCOMB, C. J., TOLMAN, FULLERTON, and MOUNT, JJ., concur.

[No. 15555. Department One. January 27, 1920.]

THE STATE OF WASHINGTON, *on the Relation of C. A. LaGrave, Appellant,* v. THE CITY OF SEATTLE, and HARRY W. CARROLL, *City Comptroller, Respondents.*[1]

MUNICIPAL CORPORATIONS (65, 90)—OFFICERS AND AGENTS—REMOVAL—CIVIL SERVICE RULES. A city council has power to abolish an office and distribute the duties among other employees of the office, thereby making a saving without an addition to the force, where the civil service rules gave the incumbent no preference right of employment over those assigned to perform his duties.

Appeal from a judgment of the superior court for King county, Allen, J., entered June 2, 1919, upon findings in favor of the defendants, in an action to compel the reinstatement of a discharged civil service employee, tried to the court. Affirmed.

Jas. A. Dougan, for appellant.

Walter F. Meier, Geo. A. Meagher, and *H. R. Fullerton,* for respondents.

PARKER, J.—The relator, LaGrave, commenced this proceeding in the superior court for King county, seeking a writ of mandate to compel his reinstatement as an employee in the office of the city comptroller in the

[1] Reported in 187 Pac. 339.

city of Seattle, invoking the civil service provisions of the city charter in that behalf. A trial in the superior court upon the merits resulted in findings and judgment denying to the relator the relief prayed for, from which he has appealed to this court.

The relator was employed for a number of years immediately preceding October 4, 1918, by the city of Seattle in its comptroller's office. His civil service standing and classification was designated as "Accountant grade B 7." This has reference only to his rank or standing as an employee and not to his duties as an accountant, other than that his duties were that of an accountant, speaking generally. During several years prior to relator's discharge on October 4, 1918, he occupied the position of "Chief Accountant" in the comptroller's office. This designation of his position had reference to the nature of his duties, and the comptroller, under whom he was working, assigned to him the performance of duties such as would ordinarily be performed by one occupying a position so designated in an office in which a number of persons are employed doing accounting and clerical work. The position had been so designated, covering a period of a number of years prior to relator's discharge, in several communications written by the comptroller to other departments of the city government; it had also been so designated in communications written by the relator himself to other departments of the city government; and it was so designated in the salary ordinance which was in force prior to and up to the time of relator's discharge. There had been passed by the city council an ordinance, which became effective on October 4, 1918, in express terms abolishing the position of chief accountant in the office of the city comptroller; and by authority thereof, on October 3, 1918, the city comptroller addressed a communication to the

civil service commission, advising that commission of the fact that the relator had been discharged from the position of chief accountant in his office, to take effect October 4, 1918, stating the reason therefor to be that such position had been abolished by ordinance. This communication to the civil service commission was made with a view of complying with a provision of the charter requiring notice of the discharge of employees to be given the commission. The trial court found in part as follows:

"That since the 4th day of October, 1918, part of the work formerly done by the relator herein has been performed, and is being performed, by other qualified civil service employes of the city of Seattle employed in the department of the city comptroller and ex-officio city clerk in connection with and as a part of their other duties, and no addition to the office force has been made to fill the position abolished. That by reason of the abolishment of said position of chief accountant a saving in the actual running expenses of the department of city comptroller and ex-officio city clerk of the city of Seattle in the way of salaries has been made in a sum approximating one hundred ninety dollars ($190) per month.

"That since the 4th day of October, 1918, no appropriation was made by the city council of the city of Seattle for the purpose of providing a salary for the position of chief accountant, and no appropriation during said period was made by the said city council for the purpose of providing for salaries for the same position by another name.

"That said ordinance No. 38736, abolishing the position of chief accountant, was passed in good faith and in the interest of economy, and not for the purpose of circumventing and evading the civil service act of the city of Seattle."

We have read the evidence introduced upon the trial, which we have before us, and deem it sufficient for pres-

ent purposes to say that we are quite convinced that it supports these quoted findings of the trial court.

The principal contention of counsel for appellant seems to be that the passage of the ordinance abolishing the position which he occupied was not passed in good faith, or with any other motive on the part of the city than to work the discharge of relator from the city's service. As we have already noticed, however, the findings of the trial court were to the contrary, and we are satisfied that such findings have ample support in the evidence. This being true, there seems little to be said by us, in the light of the well settled law touching the power of the city of Seattle to discharge civil service employees. The rule decisive of this case, as we view it, is well stated by Judge Fullerton, speaking for the court in *Kessler v. Seattle,* 93 Wash. 192, 160 Pac. 423, as follows:

"The power of the city council to reduce the number of city employees in the interest of economy cannot be successfully questioned. Where such a reduction is made requiring a dismissal or suspension of some employee, it is not a matter of injustice, requiring correction by the courts, for the appointing power in making a selection among those equally efficient to retain those longest in service."

This statement of the law and the city's power in the premises finds abundant support in the former decisions of this court: *King v. Listman,* 63 Wash. 271, 115 Pac. 93; *State ex rel. Voris v. Seattle,* 74 Wash. 199, 133 Pac. 11; *State ex rel. Burris v. Seattle,* 82 Wash. 464, 144 Pac. 695.

Counsel for appellant relies particularly upon our decision in *State ex rel. Gilmur v. Seattle,* 83 Wash. 91, 145 Pac. 61. In that case, there was involved a manifest attempt on the part of the city authorities to discharge an employee holding a position under the civil

service provision of the charter, by abolishing the position, in name, which he held and, immediately upon his discharge, re-creating it under another name and giving the position to another, with the same duties attached thereto as had been performed by Gilmur. We are quite convinced that the facts of this case do not bring the claims of the relator here made within the rule of that decision, or any of the decisions therein cited as supporting the law as therein announced.

It does appear, we may concede, that the duties which relator performed as chief accountant in the city comptroller's office, upon the abolition of the position he occupied, were distributed among other employees of the office; but it does not appear that the relator has any preference right of employment, under the civil service rules, superior to the right of any of those to whom the duties he performed were assigned.

We are quite convinced that the judgment of the trial court must be affirmed. It is so ordered.

HOLCOMB, C. J., MAIN, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 15651. Department One. January 27, 1920.]

THE STATE OF WASHINGTON, *on the Relation of Spokane & Eastern Trust Company et al., Plaintiff*, v. THE SUPERIOR COURT FOR SPOKANE COUNTY, *Bruce Blake, Judge, Defendant.*[1]

APPEAL (62)—FINAL ORDERS—PROHIBITION. A writ of prohibition is a special proceeding and from a final judgment an appeal may be taken to the supreme court under Rem. Code, § 1033.

APPEAL (244)—SUPERSEDEAS—BY SUPREME COURT—DISCRETION—MERITS OF APPEAL. Upon appeal from the denial of a writ of prohibition, supersedeas, while discretionary, will ordinarily be granted if necessary to preserve the *status quo* or the fruits of the appeal, but only after the discretion is exercised upon an examination into the application for the supersedeas to determine whether the appellant's substantial rights will be injured.

SAME. The proper exercise of the discretion of the supreme court to grant a supersedeas in aid of its appellate jurisdiction requires a denial of the supersedeas if the court determines there is no substantial basis for the appeal.

WITNESSES (3)—SUBPOENA DUCES TECUM—RIGHT TO. A witness subpoenaed *duces tecum* cannot refuse to produce books which are shown to be material, on the ground of their immateriality, if they are not confidential or of a privileged character.

SAME. A showing that books were necessary to enable a referee to make his findings of fact and report upon an accounting and that no other source was accessible, is sufficient to justify the issuance of a subpoena *duces tecum*.

SAME. A witness subpoenaed *duces tecum* cannot refuse to produce the documents on the ground of their inadmissibility or of their weight as evidence.

SAME. Noncompliance with a subpoena *duces tecum* cannot be excused on the ground of the inconvenience to the witness.

SAME. It is not a valid objection to a subpoena *duces tecum* to produce the books of a bank before a referee that they contain confidential communications with other parties which may be made public, since it is presumed that the referee will not permit any such improper use of the records.

[1] Reported in 187 Pac. 358.

Application filed in the supreme court December 2, 1919, for a writ of mandamus to compel the superior court for Spokane county, Blake, J., to fix the amount of a supersedeas bond on appeal. Denied.

Cyrus Happy and *O. C. Moore (Graves, Kizer & Graves,* of counsel), for relators.

Geo. W. Belt and *Fred M. Williams,* for defendant.

MACKINTOSH, J.—In the superior court for Spokane county, before the Honorable Bruce Blake, one of the judges thereof, there was pending an action entitled Daniel v. Daniel, in which the plaintiff claimed an undivided interest in certain property located in Spokane, and the right to an accounting for the rents, issues and profits thereof. In January, 1918, the court entered a decree in favor of the plaintiff, awarding her an undivided interest in the property and an accounting for one-twelfth of the rents, profits and issues for the period beginning December, 1903. In that accounting the amount of taxes and assessments paid out by the defendant were to be ascertained, together with the costs and improvements made by the defendant and the cost of materials, repairs and upkeep. There was also to be ascertained the amount of the mortgage which existed in December, 1903, and the amount of the mortgages which now exist, and what use or disposition was made by the defendant of the funds received from the mortgages. An appeal from this decree was taken by the defendant to this court, where it was affirmed and may be found reported in *Daniel v. Daniel,* 106 Wash. 659, 181 Pac. 215.

Upon the remittitur going down, Judge Blake appointed S. P. Domer as referee to take the accounting in accordance with the terms of the decree. On October 21, 1919, testimony was commenced to be taken

before the referee, when the defendant Daniel submitted a written account of the rents, profits and issues from December, 1903, to date, and testified that no books of accounts, records, deposit books, leases, checks, documents or memoranda were in his possession from which the account was compiled, and that the same had been made entirely from his recollection. He further testified that he had deposited the rents derived from the property in certain banks in Spokane, one of which, the Spokane and Eastern Trust Company, is the relator in this action; that his brother, during four years of the time, was associated with him as part owner of the property and had collected and received portions of the rents and had deposited the same in this bank. The plaintiff claimed before the referee that the production of the account of the defendant and his brother with the Spokane and Eastern Trust Company, the relator, was necessary in order to enable the referee to take a proper accounting, and that no other source accessible to the plaintiff existed from which to obtain the information that the bank's books would show. The plaintiff asked for a subpoena *duces tecum* to issue to the proper officers of the bank to produce its books, records and papers, in so far as they related to the account of the defendant and his brother covering the period under examination before the referee. The referee, being satisfied that the material sought by the subpoena was necessary for a full and complete disclosure of the rents, issues and profits, directed the issuance of the subpoena *duces tecum* to the bank. (When we use the word "bank" we are, for the sake of brevity, using it as inclusive of the bank itself and its officers, to whom the subpoena was directed.)

The bank refused to produce the evidence called for in the subpoena, whereupon an action entitled the

State of Washington on the relation of the Spokane & Eastern Trust Company v. Domer was instituted in the superior court for Spokane county, for the purpose of prohibiting Domer, as referee, from proceeding against the Spokane & Eastern Trust Company for the violation of the subpoena; the referee having threatened to punish the bank for contempt in failing to obey the subpoena. Upon the hearing in the superior court before the Honorable Bruce Blake, the writ of prohibition was quashed and the proceeding dismissed, whereupon the Spokane & Eastern Trust Company appealed and made an application to Judge Blake for an order fixing the amount of the supersedeas bond on appeal to this court from the order denying the petition for a writ of prohibition. This motion for supersedeas bond was denied. The Spokane & Eastern Trust Company then came to this court in this action with a petition for a writ of mandate to issue to the superior court of Spokane county and Bruce Blake, judge thereof, directing them to fix the amount of the supersedeas bond to be given on appeal to this court from the dismissal of the prohibition action in the superior court of Spokane county. The matter is before us on this petition.

The writ of prohibition sought in the superior court was a special proceeding, and from a final judgment in such proceeding § 1033 of Rem. Code, provides that an appeal may be taken to the supreme court. *State ex rel. Nooksack River Boom Co. v. Superior Court,* 2 Wash. 9, 25 Pac. 1007; *State ex rel. Prosecuting Attorney v. Union Savings Bank of Spokane,* 86 Wash. 48, 149 Pac. 327. And where the court has issued a writ of prohibition, supersedeas is granted on appeal. But where, in the superior court, the writ of prohibition or mandate or injunction has been denied, the granting of supersedeas is a matter of discretion with the court,

and in the exercise of that discretion this court has said that supersedeas will ordinarily be granted where, if not granted, the appeal would be made futile, depriving the appellant of the fruits of his appeal; that the *status quo* will be preserved pending the determination of the appeal upon its merits. *State ex rel. German-American Safe Deposit & Savings Bank v. Superior Court,* 12 Wash. 677, 42 Pac. 123; *State ex rel. Barnard v. Board of Education,* 19 Wash. 8, 52 Pac. 317, 67 Am. St. 706, 40 L. R. A. 317; *Packenham v. Reed,* 37 Wash. 258, 79 Pac. 786; *State ex rel. Davis & Co. v. Superior Court,* 95 Wash. 258, 163 Pac. 765; *Bier v. Clements,* 95 Wash. 505, 164 Pac. 82. But these cases, while preserving the *status quo* in order to protect the appellant in the event of his success on the appeal, require that the discretion of the court should be exercised after an examination into the application for the supersedeas to determine whether the appellant has any substantial right which would be injured by the refusal of the supersedeas. *State ex rel. Bringgold v. Burns,* 21 Wash. 227, 57 Pac. 804; *State ex rel. Cawley v. Bremerton,* 32 Wash. 508, 73 Pac. 477; *State ex rel. Martin v. Poindexter,* 43 Wash. 147, 86 Pac. 176.

Although the court should place no obstacles in the way of one appealing as he is permitted by statute, still, it is to be remembered that the appeal is a privilege which is accorded, and although that privilege is looked upon with favor, still, if its exercise interferes with the rights of others, and the appeal itself upon the record presented in the mandamus action appears to be without merit, a supersedeas will not be granted, although such denial may virtually dispose of the appeal and destroy any possibility of its efficacy to the appellant. In other words, the fact that, though the result sought to be prevented by the appeal may be accomplished by the failure to grant the supersedeas,

this court cannot be deprived of its right to exercise its discretion in the refusing or granting of the supersedeas in aid of its appellate powers; and if, in the examination which must necessarily be made of the merits of the appeal to determine the proper way in which that discretion shall be exercised, this court determines there is no substantial basis for the appeal, the proper exercise of its discretion in such cases requires that the supersedeas be denied.

In a case such as this before us, although the appellant is pursuing a remedy accorded it by law, on the other hand, it is not to be forgotten that it is interfering with the conduct of a trial in a court of justice, and that such interference is not ordinarily to be sanctioned, even though, by withholding the supersedeas, the fruits of appellant's appeal may be entirely destroyed before the appeal is heard on its merits.

It becomes necessary, therefore, to investigate the merits of this controversy as they are shown in the record presented on this application for a writ of mandate. That record shows that the testimony sought to be secured by the subpoena *duces tecum* is testimony which is necessary to the plaintiff's case, and the only testimony available to the plaintiff for the purpose of establishing that the account offered by the defendant is inaccurate. Under the peculiar circumstances of this accounting, the sources of information are extremely limited, and it would result in a virtual denial of justice were she prevented from using even such meagre information as the books of the Spokane & Eastern Trust Company may reveal. It is, of course, entirely possible that an examination of those books will be of no material assistance, but, according to the record, the plaintiff claims that they will be of assistance, and there is no substantial denial of that contention. A witness cannot refuse to answer a sub-

poena on the ground that he does not believe that his testimony will be of any benefit to the party subpoenaing him, in face of the fact that the testimony is material and necessary. The law recognizes the right of a witness subpoenaed *duces tecum* to refuse to produce documents which are not material or which on account of their confidential or privileged character could not be received in evidence. *Lawson v. Black Diamond Coal Min. Co.*, 44 Wash. 26, 86 Pac. 1120; *State ex rel. Seattle General Contract Co. v. Superior Court*, 56 Wash. 649, 106 Pac. 150, 28 L. R. A. (N. S.) 516. But where, as here, a showing of materiality has been made and the books and records are not of that confidential or privileged character which render them inadmissible, the witness has no right to then refuse production.

The Spokane & Eastern Trust Company asserts that a subpoena *duces tecum* need not be complied with if the court from which it is issued is exceeding its jurisdiction. The record in this case does not show that the subpoena is in itself insufficient, nor that the referee was exceeding his power in its issuance.

The Spokane & Eastern Trust Company asserts that, in order to justify the issuance of the subpoena *duces tecum*, the court issuing it must require a showing in advance of the competency, relevancy and materiality of the books and papers the production of which is sought. The record here shows that the production of these books "became and was important and necessary in order to enable this defendant, as referee, to make his findings of fact and report pursuant to the order of reference, and that there was no other source accessible to the plaintiff to obtain the information from the said books, papers and documents except by the production thereof." This showing was certainly sufficient to justify the issuance of the subpoena *duces*

tecum, and the subpoena was not, as so issued, void as being without or in excess of jurisdiction.

The Spokane & Eastern Trust Company asserts that a witness cannot be held for contempt on a refusal to answer incompetent or improper questions, and such witness cannot be held for contempt on a refusal to produce documents which do not contain competent or relevant evidence. As we have already shown, this evidence is material, competent and relevant.

The Spokane & Eastern Trust Company further asserts that Daniel did not make the entries contained in the books and that those entries would not even tend to indicate the sources from which deposits were derived, and that, therefore, the entries could not affect the rights of Daniel in the accounting. Although it may be that they are not the books of the accounts of the defendant, and not books of original entry, still they are proper evidence and will throw some light upon the accuracy of the account submitted by the defendant Daniel, and it is not for the Spokane & Eastern Trust Company to say the amount of weight they will carry nor the conclusiveness of their showing upon the referee. The witness subpoenaed in a case and the witness subpoenaed *duces tecum* are not in any different position before the court. It is not for either to comply or to refuse to comply with the subpoena by determining for themselves the admissibility of the evidence sought nor the weight thereof.

This observation also applies to the further objection of the Spokane & Eastern Trust Company that it would be a great inconvenience to it to respond to the subpoena. If it were the rule that witnesses might respond or not to the subpoena according to the inconvenience they might suffer by responding, lawsuits would be conducted according to private, rather than

public, convenience. The further objection of the Spokane & Eastern Trust Company, that to comply with the subpoena would entail great expense, is answered in the same way.

It is also asserted by the Spokane & Eastern Trust Company that the books and records called for contain confidential communications with clients of the bank other than defendant Daniel, and that, by their production in court, these communications might become public property. The answer to this is, first, that the referee has plainly said that he is not going to divulge any such confidential communications that accidentally might see the light of day; and second, it is to be presumed, in the absence of evidence to the contrary, that a public official, such as the referee, in the performance of his sworn duty, is not going to allow records introduced before him to be used for any but their proper purpose, nor is he going to convert the trial of the cause into material for general gossip.

As a matter of fact, the record shows that the Spokane & Eastern Trust Company is not making any very serious objection to answering the subpoena; that the objection is coming from the defendant Daniel, the record showing that the Spokane & Eastern Trust Company, in appearing in response to the subpoena, merely stated, through its attorney, that the records called for would weigh half a ton; that some of them are constantly used in the bank's business, and that is is an invariable rule of the bank never to allow them out of its custody. The argument made in this respect fails to convince us that this court should quash the subpoena on any of these grounds.

The bank's attorney stated that he was advised that the defendant is claiming the subpoena to have been issued without authority, and that, under such circumstances, the bank "has felt constrained to allow the

matter to be tested out." To the question, "The bank has no objection to complying with the subpoena; they are simply standing on the objection made by counsel, I understand?" the bank's attorney answered; "That is the situation. There is no objection except the legal objection."

There is also involved in the case the subpoena *duces tecum* for the books of the Trader's National Bank, now in the custody of the Spokane & Eastern Trust Company. What we have said in this opinion applies equally to the books and records of the Trader's National Bank.

This examination into the facts of the case indicates to us clearly that the appeal is without merit, and therefore, in the exercise of our discretion, the application for a writ of mandate to compel the issuance of supersedeas on appeal is denied.

HOLCOMB, C. J., MITCHELL, PARKER, and MAIN, JJ., concur.

[No. 15316. Department One. January 28, 1920.]

H. A. HENRIKSON, *Respondent*, v. PACIFIC COAST PACKING COMPANY, *Appellant*.[1]

SALES (3)—CONTRACTS (40, 41)—VALIDITY—SALES DISTINGUISHED FROM EMPLOYMENT—VIOLATION OF FEDERAL FOOD CONTROL ACT. A contract between a packing company and the owner of a fishing vessel whereby the owner of the vessel agreed to fish in certain waters and the company agreed to purchase the fish, paying so much per fish for all fish caught and guaranteeing a certain sum for the catch, is primarily a contract of sale and not of employment; and any guaranty of price in excess of the prices fixed by the Federal food control act is unenforceable, since such act is controlling (MITCHELL, J., dissenting).

Appeal from a judgment of the superior court for King county, Ralston, J., entered December 28, 1918, in favor of the plaintiff, upon sustaining a demurrer to the answer and the refusal of the defendant to plead further, in an action on contract. Reversed.

Bogle, Merritt & Bogle, for appellant.

G. E. Steiner, for respondent.

MAIN, J.—The purpose of this action was to recover the balance claimed to be due under the guaranty clause of a written contract. The defendant answered the complaint by certain admissions and denials and an affirmative defense. To the affirmative defense, a demurrer was interposed and sustained by the trial court. The defendant declined to plead further and elected to stand upon the defense as pleaded. Thereupon judgment was entered against the defendant as prayed for in the complaint, and from that judgment the appeal is prosecuted.

The facts alleged in the complaint and in the affirmative defense thereto will be summarized, so far as

[1] Reported in 187 Pac. 377.

necessary to present the controlling question. The complaint alleged that the respondent was the owner of the gas boat Taholah, a purse seine fishing vessel, and was himself an experienced fisherman; that the appellant was a corporation organized under the laws of the state of Washington; that, on or about the 6th day of June, 1918, the parties entered into a written contract, as follows:

"This agreement entered into at Seattle, Washington, this 6th day of June, 1918, between Pacific Coast Packing Co., hereinafter referred to as 'Company,' and H. A. Henrikson, owner of the seine boat 'Taholah'

"Witnesseth that H. A. Henrikson hereby agrees to fish in the waters of southeastern Alaska for the Pacific Coast Packing Co. exclusively during the season of 1918, and the Pacific Coast Packing Co. hereby agrees to purchase such fish so caught by H. A. Henrikson and the purse seine boat 'Taholah.'

"It is further agreed that H. A. Henrikson shall fish throughout the season of the run of humpback salmon in southeastern Alaska, the Pacific Coast Packing Co. agrees to take delivery of all fish so caught and delivered by the purse seine boat 'Taholah' to the company's plant located in Cleaveland Passage, paying for same at the rate of five cents for each and every good humpback salmon, and the going price of the district for all other fish so caught and delivered to the plant of the company.

"H. A. Henrikson agrees, whenever possible, to turn over all fish taken by the seine boat 'Taholah' to the plant of the company, but in the event that he is unable to make delivery to the plant before the fish might spoil, he is to be permitted to dispose of the fish elsewhere. Amount received by H. A. Henrikson for fish so sold shall apply upon this agreement.

"The Pacific Coast Packing Co. hereby agrees that in case H. A. Henrikson does not catch enough of the various kinds of fish during the season of 1918 to the amount of $500 per share of ten shares, they will pay

the difference between the amount earned and $500 per share of ten shares.

"The company agrees to furnish free oil for the operation of the purse seine boat 'Taholah' for the voyage from Seattle to the company's plant and for the return voyage to Seattle.

"Witnessed: Seattle Coast Packing Co.
"H. C. Barney. By W. S. Clark, Sec. and Treas.
"J. D. Clark. Accepted H. A. Henrikson
"Owner of Purse Seine Boat 'Taholah.'"

That, in pursuance of this agreement, respondent went to the waters bordering the Territory of Alaska with his fishing vessel and fished during the season of 1918; and that for the fish caught he received the sum of $1,824.15. Prayer is made for a judgment for the difference between this sum and the sum of $5,000 mentioned in the written contract, or $3,175.85. The affirmative defense alleged, after admitting the making of the contract set out in the complaint, that it owned and operated a salmon canning plant located on Frederick Sound, in the southeastern portion of the Territory of Alaska; that the respondent went to Alaska during the season of 1918 and caught and delivered to the appellant a certain quantity of salmon; that, on August 10, 1917, the Congress of the United States duly passed, and thereafter the President of the United States approved, an act entitled: "An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," which act is known as the Federal food control act; that, at the time of the execution of the contract upon which the respondent's action is based, the act was in full force and effect, and has since this time remained in force and effect; that, in the act, the President of the United States was given full power and authority to carry out and enforce the

provisions thereof, and to make such regulations and issue such orders as were essential for that purpose; that, under the power and authority so vested in the President, and long prior to the making of the contract between the parties to this action, there was duly created a food administration of the United States, for the purpose of carrying out and enforcing the provisions and purposes of the act; that, prior to the making of the contract between the parties to this action, the United States food administration, under and by virtue of the act, and with the approval of the President, determined and fixed the prices of salmon which the appellant had the right to pay and which the fisherman had the right to receive; that the respondent had been paid for all the salmon caught and delivered to the appellant the prices fixed in pursuance of the Federal food control act; and that the reason for not paying the balance claimed to be due under the guaranty clause in the contract was that to do so would be to pay more for the fish received than the prices fixed under and by authority of the food control act. It thus appears that all the fish caught by the respondent during the season of 1918 and delivered to the appellant had been paid for at the prices fixed by the United States food administrator.

The controlling question is whether the guaranty clause in the contract was an unlawful undertaking as violating the Federal act, if it resulted in paying more for the fish than the prices fixed by the food administrator. The respondent claims that the contract, properly construed, is one of employment, and therefore does not come within the provisions of the act. The appellant contends that the contract is one for the sale of fish, and that the prices fixed by the Federal food administrator are controlling, and that an agreement to pay more would be illegal and void.

Which of these contentions is correct depends upon the construction to be given to the contract. It must be admitted that in the contract there are certain provisions which would indicate that it was one of employment, while there are other provisions that would show that it was a contract for the sale of the salmon to be caught during the season mentioned. A careful consideration of the contract leads to the conclusion that its dominating characteristics are those of a sale and not of employment. Its primary purpose was for the sale to the appellant of the fish caught by the respondent. By the agreement the appellant was required to "purchase" the fish caught by the respondent and the boat, of which he was the owner. The appellant agreed "to take delivery of all fish so caught" at its plant, "paying for the same" at so much per fish. The contract does not provide for paying the respondent, the vessel, or its crew for the time spent as appellant's employees. It does purport, when all of its provisions are considered, to be a contract for the purchase of fish at the prices specified.

If the respondent can recover, under the guaranty clause in the contract, more than the prices fixed by the Federal food administration, the law under which such prices were so fixed would be nullified. The purpose of the food control act, as applied to the subject-matter of the contract here in controversy, was to insure fishermen a reasonable price for the fish they caught, enable the cannerymen to secure an adequate supply of fish for canning purposes at such a reasonable price as would enable them to sell the same at a reasonable price to the purchasing public and make a fair profit. If the act could be avoided by contracts such as the one here in question, its provisions would be largely defeated. To hold that this contract was one of employment, and therefore not subject to the

regulations of the Federal food administration, would be to put a premium upon subterfuge. While the food control act remains in force and effect, its provisions must be held controlling, and contracts made in violation thereof are unenforcible. The trial court was in error in sustaining the demurrer to the affirmative defense, because the facts there pleaded would prevent a recovery.

The judgment will be reversed, and the cause remanded with directions to the superior court to overrule the demurrer to the affirmative defense in the answer.

HOLCOMB, C. J., PARKER, and MACKINTOSH, JJ., concur.

MITCHELL, J. (dissenting) — I dissent. I have no doubt the contract was made in the best of faith. Appellant alleges it is a domestic corporation. Manifestly, in addition to its prospects of profits, with commendable zeal and catching the spirit of the times, it determined, even at some financial risk, to commence or continue operating a cannery for the support of the government's needs for the increased production and preparation of food, and made this contract; and now, after it appears to have been faithfully performed by the other party, it seeks to hide behind the government and, through a strained construction of its contract, escape from the effects of its solemn obligation.

The essential and controlling error in the majority opinion as to the purpose of the contract — which adopts the contention of appellant — lies in its conclusion: "Its primary purpose was for the sale to the appellant of the fish caught by the respondent." On the contrary, the contract is entitled to no other construction than that of an attempt on the part of the

appellant to make a dependable arrangement for a needed supply of fish for its cannery and payment to respondent by the plan of the number of fish caught and delivered, together with an assurance against possible loss incidental to the hazard of the undertaking. There can be no question but that, under the terms of the contract, if respondent had caught and delivered to the appellant such a number of fish that the amount to be paid respondent had exceeded $5,000, appellant would have been compelled, and probably pleased, to pay such excess, with the result of eliminating from the contract any further need for the assurance of $5,000; thus demonstrating that the assurance of $5,000 was in no sense a fixing of the price of the fish, but intended only to protect the respondent against possible loss in order to induce him to undertake the catching of the fish for the cannery. If the theory of appellant is correct, it means that, if respondent's catch, at regulation prices, had equaled or exceeded $5,000, the contract would be unassailable; but if the catch, at regulation prices, were less than $5,000, as was the case here, then the contract is wholly illegal because against public policy. That is, the test of the validity of the contract, upon its being carried out, is found in the final result, theretofore uncertain, which no one could have foreseen or estimated with reasonable certainty. Assume faithful service on the part of the respondent through the whole period covered by the contract had resulted in catching no fish; certainly appellant could be made to pay its obligation of $5,000. To the extent fish were caught and delivered, the contract price (subject to the government's control) fixed the compensation for the services. But for the risks incidental to so uncertain an enterprise, provision was made by the assurance of $5,000. The price was certain, or made so by the government; the risk was un-

certain. No one wishes for an assurance that the specified due date of a promissory note will arrive, for that is certain; but often one exacts a guaranty or assurance that payment will be made, for that has the element of uncertainty. So in this case the balance of the $5,000 sued for is a promise to pay, having for its consideration the risk undertaken by the promisee, and is wholly outside of and beyond the matter of the price to be paid for the fish. Another view supporting the claim that the consideration for the promise was the risk assumed is that, if the respondent had wholly or partially failed to perform his part of the agreement (which is not the case here), to that same extent it would have afforded a defense to the action on the promise to pay $5,000.

And again, the contract provides that, if necessary to prevent spoiling, fish caught might be sold to other parties, in which event the amounts thus received should be applied on the agreement. What agreement? Surely not the agreement to pay for fish actually delivered to appellant; thus distinguishing appellant's agreement to at least divide the risk, wholly independent of its other agreement to pay as the fish were delivered. If appellant's idea of the contract is right, then one under a contract providing therefor would not be allowed to pay the transportation of men from Seattle to its cannery in Alaska, and put them, or others already there, to work on its own fishing boats with the understanding that they would be paid the regulation price at which fish were sold; because, forsooth, the expense incurred, together with the price to be paid for the fish, would exceed the price fixed by the government, and therefore the contract would be void. Or, as pertinently remarked in the argument of the case, it is difficult to understand why the cost of oil furnished by appellant for the operation of the

fishing boat from Seattle to the company's plant and return, according to the provisions of the last section of the contract, was not taken out of the amount due according to the number of fish appellant did receive.

In the fifth section, the contract provides that, if respondent does not catch enough fish to earn $5,000, appellant will pay the difference. That is, if respondent's earnings by the plan of paying so much per fish should be less than $5,000, then, to compensate him for his loss, appellant agreed, as an incident to the risks of its own cannery business, devoted to the pursuit of profit as well as the needs of the government, to pay the difference. That is the matured promise this suit is brought to enforce, and, in my opinion, it is a perfectly lawful and enforcible obligation.

[No. 15389. Department One. January 28, 1920.]

DANIEL SWANSON, *by his Guardian etc., Appellant*, v. SCHOOL DISTRICT NO. 15, PIERCE COUNTY, *Respondent*.[1]

STATUTES (25)—SUBJECTS AND TITLES—SCHOOLS AND SCHOOL DISTRICTS. Laws 1917, p. 332, providing that no action shall be maintained against school districts relating to specified matters, bears a direct relation to the title, "An act relating to actions against school districts"; and the generality of the title is not a valid objection to it.

SAME (9)—EFFECT OF PARTIAL INVALIDITY. The provision of laws 1917, p. 332, forbidding certain actions against school district officers is severable from that part of the act forbidding actions against school districts; so that failure of the title of the act to include officers does not affect the constitutionality of the balance of the act relating to school districts.

CONSTITUTIONAL LAW (102)—CLASS LEGISLATION—REMEDIES—LIABILITY OF SCHOOL DISTRICTS. Laws 1917, p. 332, providing that no action shall be maintained against school districts relating to

[1] Reported in 187 Pac. 386.

specified matters is not open to the objection of being class legislation; since it covers all school districts in the state.

STATUTES (34)—ENACTMENT—AMENDMENT OR INDEPENDENT ACT. Laws 1917, p. 332, changing the law relating to certain actions against school districts, being a complete and independent act without reference to prior laws on the subject, does not offend against Const., art. 2, § 37, providing that no act shall be revised or amended by reference to its title but the revised act shall be set forth in full.

STATUTES (41)—IMPLIED REPEALS. While repeals by implication are not favored, the later of two irreconcilable acts must prevail.

CONSTITUTIONAL LAW (39)—JUDICIAL POWERS—SEVERITY OF LAW. The courts cannot declare a law unconstitutional because of its severity, if it meets constitutional requirements in other respects.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered March 26, 1919, upon sustaining a demurrer to the complaint, dismissing an action in tort. Affirmed.

Fremont Campbell and *H. G. Fitch,* for appellant.

William D. Askren, Frank D. Nash, and *J. A. Sorley,* for respondent.

MAIN, J.—Daniel Swanson, a minor, by his guardian *ad litem,* brings this action for the purpose of recovering damages for personal injuries, alleged to be due to the negligence of the officers and agents of the defendant school district. The officers of the district are not parties to this action. To the complaint, a demurrer was interposed, and sustained by the trial court. The plaintiff elected to stand upon his complaint and refused to plead further. Thereupon a judgment was entered dismissing the action, from which this appeal is prosecuted.

Daniel Swanson, while attending school in district No. 15, Pierce county, was seriously injured upon a circular saw which was maintained and operated in the manual training department of the school. Without reviewing the allegations of the complaint, it may

be said that a cause of action is there stated, unless recovery is barred by reason of chapter 92, Laws of 1917, p. 332, which is as follows:

"An act relating to actions against school districts.

"Be it enacted by the legislature of the state of Washington:

"Section 1. No action shall be brought or maintained against any school district or its officers for any non-contractual acts or omission of such district, its agents, officers or employees, relating to any park, playground, or field house, athletic apparatus or appliance, or manual training equipment, whether situated in or about any school house or elsewhere, owned, operated or maintained by such school district."

The act on its face purports to relieve school districts and their officers from liability for injuries arising out of the "manual training equipment" of the school. Under the prior statute (Rem. Code, § 951), as construed in *Redfield v. School District No. 3,* 48 Wash. 85, 92 Pac. 770, and *Howard v. Tacoma School District No. 10,* 88 Wash. 167, 152 Pac. 1004, Ann. Cas. 1917D 792, school districts were liable in such cases. Chapter 92 of the Laws of 1917, p. 332, above referred to, has been before this court a number of times for construction. *Bruenn v. North Yakima School District No. 7,* 101 Wash. 374, 172 Pac. 569; *Foley v. Pierce County School Dist. No. 10,* 102 Wash. 50, 172 Pac. 819; *Holt v. School District No. 71,* 102 Wash. 442, 173 Pac. 335; *Bailey v. School District No. 49,* 108 Wash. 612, 185 Pac. 810; but in none of those cases were the questions urged upon this appeal presented. The act is now assailed as unconstitutional for three reasons.

It is first contended that the title of the act is not sufficient under § 19, article 2, of the constitution, which provides that: "No bill shall embrace more than one subject, and that shall be expressed in the title." The act is entitled: "An act relating to actions against

school districts." In the body of the act it is provided that "no action shall be brought or maintained against any school district or its officers for any non-contractual acts or omission of such district, its agents, officers or employees, . . . relating to any manual training equipment" and the other things there specified. The title of the act is general; the body of the act seeks to relieve school districts and their officers from liability for noncontractual acts or omissions of duty in certain specified particulars. As applied to the district, the title of the act is broader than the provisions of the act itself, and it cannot be held the subject of the act, so far as relating to the district, is not embodied in the title. It has frequently been held that the title of an act to be sufficient need not be an index to the body thereof, and that the generality of the title is no objection to it so long as it is not made to cover legislation incongruous with itself. In *State v. Seattle Taxicab & Transfer Co.*, 90 Wash. 416, 156 Pac. 837, it was said:

"We have frequently held that the title to an act to be sufficient need not be an index to the body of the act; that it is sufficient if it is suggestive of the general subject treated; that the generality of a title is no objection to it, so long as it is not made a cover to legislation incongruous in itself; and that, under a general subject, may be included innumerable minor subjects, if these minor subjects relate to the general subject expressed and form a comprehensive whole. . . ."

The title of the act in question refers to actions against school districts. The body of the act provides that no actions shall be maintained against such districts relating to the matters therein specified. The body of the act bears a direct relation to the subject as expressed in the title. The act not only refers to the district, but to "its officers," and no mention is made

of the officers in the title. The proper construction, as related to the officers, doubtless is that it was intended to refer to them as officers of the district and not in their individual capacity, the purpose being to exempt from liability not only the district, but its officers as such. So construing the act, the title would be sufficient to cover the subject of officers. However, if this be not the proper construction, it does not follow that the act would be unconstitutional so far as it affects the district. Conceding, but not deciding, that the subject expressed in the title does not include the officers, it would not affect the result. The elimination of the officers from the act would not defeat its main purpose. Where unconstitutional provisions are severable, it is the established law of this state that their unconstitutionality will not render the remainder of the act unconstitutional, provided that, when the unconstitutional portion is stricken out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, entirely independent of that which was rejected. *State ex rel. Lindsey v. Derbyshire,* 79 Wash. 227, 140 Pac. 540. This rule is applicable even though the constitutional and the unconstitutional provisions may be contained in the same section, provided they are distinct and separable, so that the first may stand though the latter fall. In Cooley on Constitutional Limitations (6th ed.), page 211, upon this question it is said:

"The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section; for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself,

and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. . . ."

If the word "officers" should be stricken from the statute, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent. This is made clear by reference to the prior law. Section 951, Rem. Code, the prior statute on the subject of the liability of school districts, made no reference to its officers. Under that statute, as above pointed out, it was held in the *Redfield* and *Howard* cases that the district was liable for such actions as this one. The *Howard* case was decided in November, 1915, and the legislature at its next session passed the law in question, evidently having in mind the purpose of relieving school districts from the force of the prior law as it had been construed.

The second point is that the act is class legislation, and therefore in violation of § 28, of article 2, of the constitution. Little need be said upon this question. The act on its face covers all school districts within the state. In *State ex rel. Vance v. Frater,* 84 Wash. 466, 147 Pac. 25, it was held that a law dividing the counties of the state into different classes did not offend against this provision of the constitution because there was a reasonable basis for such classification. If counties may be thus subdivided, it would certainly require no extended argument to sustain the holding that a law which covers all school districts of the state, which are quasi-municipal corporations, is not subject to objection that it is class legislation.

Finally, it is contended that the act in question offends against § 37, of article 2, of the constitution, which provides that: "No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at

full length." The argument is, if we have gathered it correctly, that the act is, in effect, an amendment of the prior law and the revised act or section amended is not set forth at full length. No reference is made, either in the title or the body of the act, to any prior law. The act, upon its face, is complete in itself. The holding on this question is controlled by *Spokane Grain & Fuel Co. v. Lyttaker,* 59 Wash. 76, 109 Pac. 316. There the same question was raised with reference to an act which provided that every person furnishing material or supplies to be used in the construction, alteration or repair of any building, etc., was required to deliver or mail to the owner or reputed owner of the property upon which the materials or supplies were to be used, a duplicate statement of all such materials or supplies which were delivered to the contractor, and provided further that no materialman's lien could be enforced unless the provisions of the act had been complied with. That act made no reference to the prior law upon the subject, but provided as an additional requirement to the validity of a lien the delivery or mailing to the owner of a duplicate statement. The effect of the law was to add to the prior law an additional requirement necessary to the validity of the lien. It was there held that the act was complete in itself and satisfied the requirements of the constitution that the legislature was not required to embody all legislation relating to a given subject in a single act, but that it may cover the subject by a succession of acts. There can be no substantial distinction between that case and the present. There the statute construed added requirements to a prior law in an act making no reference to such prior statute. Here the act, in effect, takes from the operation of the prior law the liability of school districts in certain particulars. It is true that repeals by implication are not favored,

but where there is an irreconcilable repugnancy between two laws, the later in time must prevail. The case of *Copland v. Pirie,* 26 Wash. 481, 67 Pac. 227, 90 Am. St. 769, is not only distinguishable upon the facts, but it is suggested in the *Spokane Grain & Fuel Company* case that probably that case went too far in limiting and restricting the legislature as to the mode it might pursue in the enactment of laws. The question upon this branch of the case is so fully and completely discussed in the *Spokane Grain & Fuel Company* case that further comment here seems unnecessary. Even though the act be a harsh law and unjust in its operation, the court has no right or power to declare it unconstitutional for this reason when it meets the constitutional requirements in other respects. The relief, if any, must be sought from the legislature.

The judgment is affirmed.

HOLCOMB, C. J., PARKER, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 15518. Department Two. January 28, 1920.]

ALEX GARDINER, *Appellant*, v. JOSEPH GYOROG, *Respondent*.[1]

SALES (29) — CONSTRUCTION — SUBJECT-MATTER — QUANTITY AND ASCERTAINMENT THEREOF. A contract for the sale of three tons of cascara bark and also all bark that defendant "shall peel or have for sale during the season" does not include bark in excess of three tons in the possession of the defendant which he did not peel and was not offering for sale that season.

INJUNCTION (6, 7)—INADEQUACY OF REMEDY AT LAW—RECOVERY OF DAMAGES. The inadequacy of the remedy at law for breach of a contract to sell cascara bark which could have been purchased elsewhere at a small advance, is not sufficiently shown where the only evidence of defendant's insolvency was the inference to be drawn from the fact that he was the head of a family, and that he owned a home worth $300, an automobile worth $400, and one ton of cascara bark.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered April 25, 1919, dismissing an action for an injunction, tried to the court. Affirmed.

Sherwood & Mansfield, for appellant.

MOUNT, J.—This action was brought to enjoin the defendant from selling cascara bark to any one except the plaintiff. Upon issues joined, the case was tried to the court without a jury, and at the conclusion of the evidence the trial court was of the opinion that the plaintiff had an adequate remedy at law for damages, and thereupon dissolved the temporary restraining order which had theretofore been issued, and dismissed the action. The plaintiff has appealed.

It appears that, on August 11, 1918, the parties entered into the following contract:

[1] Reported in 187 Pac. 318.

"In consideration of one dollar each to the other paid, receipt of which is hereby acknowledged, Gyorog Bros. of Hartford, Wash., party of first part, sells and binds himself to deliver to Alex Gardiner, of North Bend, Wash., party of the second part, three tons prime, dry, merchantable cascara bark, packed in sound sacks, also all prime, dry, merchantable cascara bark, party of the first part shall peel, or have for sale during the season of 1918.

"At the price of 13c per pound.

"Delivery shall be made at Hartford, Wash., when bark is ready 1918.

"Party of the first part hereby acknowledges an advance payment of $100.

"Signed in duplicate this 11th day of August, 1918."

This contract was signed by the parties. Thereafter the respondent delivered to the appellant 5,325 pounds of cascara bark, and afterwards refused to deliver any more bark. After the delivery of the 5,325 pounds, the respondent purchased from other parties about two tons of cascara bark. The appellant demanded that the respondent deliver this quantity of bark, in addition to that already delivered, at the price of thirteen cents per pound. The respondent testified that he did not peel this bark himself; that he purchased it from other parties at from thirteen and three-quarters to fourteen cents per pound; that he was not offering it for sale during the year 1918 and intended to keep it for sale the next year. When the appellant demanded all of this bark, the respondent agreed to deliver to him the 675 pounds to make up the balance of the three tons, at the rate of fourteen cents per pound. Appellant refused to take this at first, but afterwards changed his mind and offered to take it, and then respondent refused to deliver any more bark.

The appellant argues that he is entitled to all of the bark owned by the respondent during the year 1918; that respondent is insolvent and unable to respond in

damages; and that, therefore, the court erred in not enjoining the respondent from selling this two thousand pounds of bark to other persons. It seems to us that the contract is plain to the effect that the respondent agreed to sell and deliver to the appellant three tons of cascara bark; also all prime cascara bark party of the first part might peel or have for sale during the season of 1918. His evidence very plainly shows that he did not peel the bark which he had on hand after the delivery of the 5,325 pounds, and also shows that he was not offering this bark for sale at that time. It follows, therefore, that the appellant was entitled to the difference between 5,325 and the 6,000 pounds provided for in the contract. The evidence shows that the appellant could have purchased this bark at an advance of probably one cent per pound over the contract price. In other words, the appellant in an action at law for damages, could recover one cent per pound, or $6.75. The appellant insists that the respondent is insolvent, and therefore execution proof, and that a judgment for damages would be of no avail. The only evidence of insolvency of the respondent is his testimony to the effect that he owned a house worth about $300, and an automobile worth about $400. It also appeared that he was the head of a family. The record also shows that he has on hand about 2,000 pounds of cascara bark. There may be an inference here that the respondent is insolvent, but we think it is not plain, even upon these facts, that the respondent could not respond to whatever damages the appellant might recover in an action at law for damages.

"The general principle by reason of which a litigant is remitted to a court of law if he has an adequate and efficient remedy in that tribunal, is also the test of his right to an injunction restraining the breach of a contract. The court must be satisfied of the inadequacy

of the legal remedy before it will grant the desired relief. The contract in question must not lack mutuality, must be clearly proved, and must be complete, certain and unambiguous in all of its terms, so that the rights and obligations of the parties may not be misunderstood or be in any way vague or uncertain. It seems also that the contract must be one on which an action at law could be maintained. Whether it is of such a character may, of course, be more easily and better shown by the contract itself where it has been reduced to writing." 14 R. C. L., § 84, page 383.

The court below was not satisfied of the inadequacy of the legal remedy, and we are of the opinion was amply justified by the proof upon this question.

We find no error. The judgment is therefore affirmed.

HOLCOMB, C. J., BRIDGES, FULLERTON, and TOLMAN, JJ., concur.

[No. 15526. Department Two. January 28, 1920.]

DAVID E. NEER *et al., Respondents,* v. THE CITY OF SUMAS, *Appellant.*[1]

MUNICIPAL CORPORATIONS (420)—STREETS—DEFECTIVE SIDEWALKS—NEGLIGENCE OF CITY—UNPRECEDENTED FLOODS. The fact that a sidewalk was tilted out of level by an unprecedented flood and remained so for ten days, does not show negligence on the part of the town, where practically all the sidewalks had been washed out of place or destroyed and the city, after using every effort in its power, had been unable to repair the damage before the accident.

Appeal from a judgment of the superior court for Whatcom county, Pemberton, J., entered December 17, 1919, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained through a defective sidewalk. Reversed.

[1] Reported in 187 Pac. 337.

R. S. Lambert and *C. E. Abrams,* for appellant.

Sather & Livesey, for respondents.

MOUNT, J.—This action was brought by the plaintiffs, as husband and wife, to recover damages for injuries received by Mrs. Neer on account of a fall on a sidewalk within the limits of the city of Sumas.

The complaint alleged that the fall of Mrs. Neer

"was due to a defective condition of the sidewalk on Vancouver avenue at said point, which sidewalk was six feet wide, made of boards, and tilted so that the southerly side thereof was elevated seven and a half inches above the northerly side thereof; that said tilting was the proximate cause of the accident and injury to plaintiff Belle Neer; that the sidewalk was, at the time of the accident, by reason of falling rains, moist, wet and slippery, and thereby additionally dangerous; that it had been so defective for a long time prior to the accident, that its condition was well known to defendant, and that defendant gave no warning of its defective condition and erected no barrier preventing its use; . . ."

After denying these allegations of negligence, the answer alleged two affirmative defenses, in substance: first, that the condition of the sidewalk at the place of the accident was caused by an unprecedented flood which visited the city and surrounding country ten or twelve days prior to the accident, damaging many thousands of feet of sidewalk within defendant's corporate boundaries; that the same constituted an act of God which could not have been foreseen or successfully resisted or guarded against; and that sufficient time had not elapsed, between the damages wrought by the flood and the date of the injury to Mrs. Neer, to enable defendant to repair the walk.

The second affirmative defense was, in substance, that Mrs. Neer was guilty of contributory negligence in going upon the sidewalk.

Upon these issues, the case was tried to the court and a jury, and resulted in a judgment in favor of the plaintiffs for $1,000. The defendant has appealed.

At the close of the respondents' case and at the close of all the evidence, the appellant requested the court to instruct a verdict for the appellant. After the verdict, motion for judgment *non obstante* was made and overruled.

There is no substantial dispute upon the evidence. The facts, in substance, are as follows: The city of Sumas is incorporated as a city of the fourth class. At the time of the injury to Mrs. Neer, which was January 12, 1918, the population of the city was between 800 and 1,200. On December 31, 1917, an unprecedented flood occurred, by reason of heavy rains and melting ice in the vicinity of the city. A large portion of the city was flooded. Witnesses estimated that the area covered by the flood was from one-half to three-quarters of the area of the whole city. Two miles of wooden sidewalks throughout the city were damaged by the flood. Many places in the city — stores and dwellings — were flooded, so that the inhabitants of the dwellings in many instances were required to move from the lower floors of their dwellings. This flood was at its height on January the 1st, 1918. It began to subside upon the 2d, and by the 4th the waters had receded to such an extent that the sidewalks were lying upon the ground, many of them in the streets, and all out of repair. On account of this flood, telephone and electric-light wires were down, and those companies had employed all the available men to repair their lines. The city of Sumas endeavored to procure men to replace the sidewalks. It was able to procure but few, and the sidewalks in the business part of the city were being attended to first. The sidewalk

upon which Mrs. Neer was injured was upon a side street. There were but three houses served by this sidewalk. This sidewalk had been lifted from its foundation, and when the flood receded, one side of the walk was about seven and three-quarters inches higher than the other side. The walk was a board sidewalk, practically new and in perfect condition before the time of the flood. Mrs. Neer and her husband, on January 12th, drove in from the country to the city and observed the condition of the streets and of the sidewalks generally. At about one o'clock on that day she undertook to go from the business part of the town to visit a friend who lived upon Vancouver avenue. She came to this walk, undertook to walk along it, slipped and fell, and broke her right leg about four inches above the ankle.

The controlling question in the case, in our opinion, is whether any negligence was shown against the city. The respondents argue that, because the sidewalk in question was tilted upon the ground so that one side was seven and three-quarters inches higher than the other, and had remained in such condition for a period of about ten days, and because the city knew of its condition and had not repaired it or posted notice of any kind of its dangerous condition, the city was therefore negligent, and the question of negligence was one for the jury. As hereinbefore stated, there was no dispute, upon the facts, that the sidewalk, before the flood, was in perfect condition. The flood came and practically destroyed two miles of sidewalk within the little city. It is true that no warning notices were posted by the city; but for the very good reason, no doubt, that the condition of all the sidewalks within the city was notice to any one who might be attempting to use them. The city, according to the evidence, used every effort to obtain workmen to repair the sidewalks,

and was able to obtain but a very few men. These men devoted their time to repairing the sidewalks on the principal streets where there was most danger. The sidewalk upon which Mrs. Neer was injured was on a side street. We are satisfied, under these circumstances, that the city was not negligent in failing to repair this particular walk. In the case of *Wilton v. Spokane*, 73 Wash. 619, 132 Pac. 404, L. R. A. 1917 D 234, we said:

"Again it is said that the city is responsible for the condition of its streets, and hence liable for any injury arising from defects therein, no matter by whom the defect may have been caused. But the rule is not so broad as this. The city is liable only for those defects in its streets of which it has knowledge, or by the exercise of reasonable diligence could have obtained knowledge. It is not a guarantor of the safe condition of its streets for all purposes and at all times. Its full duty is performed when it exercises reasonable diligence in keeping its streets in repair."

Under ordinary conditions, when a sidewalk upon a city street has been tilted seven and three-quarters inches on one side higher than on the other, and allowed to remain in such condition for a period of ten days, the city might be presumed to have notice of the condition, and it would probably be negligent not to repair it within that time. But here the evidence conclusively shows that sidewalks all over the city — two miles of them — had been washed out and practically destroyed. The city had attempted to employ men to repair the walks. It was unable to do so within that time. The record, we think, conclusively shows that the city used every effort within its power to have the sidewalks rearranged and properly repaired, but had been unable to do so, not from any fault of its own and not from any lack of diligence, but wholly by reason of existing conditions. If, under these circum-

stances, it may be said that the city was negligent, then its duty is not performed until it exercises more than reasonable diligence in keeping its streets in repair. In addition to an endeavor to employ men to replace the sidewalks, the city caused notice to be issued to the property owners along whose property these sidewalks were located to repair the same immediately. These repairs were not made in obedience to the command of the city. We do not mean by this that the city did its full duty in notifying the property owners to repair sidewalks in front of their property. This is recited merely for the purpose of showing the diligence which the city exercised. We are satisfied, upon the record, that there was no question of negligence of the city to be submitted to the jury, and that it was the duty of the court, at least at the close of all the evidence, to have instructed the jury that the respondents had not made out a case of negligence against the city.

For this reason, the judgment is reversed and the cause remanded for dismissal.

HOLCOMB, C. J., TOLMAN, BRIDGES, and FULLERTON, JJ., concur.

[No. 15551. Department Two. January 28, 1920.]

J. M. BOYD, *Respondent*, v. BART HEALY, *Appellant*.[1]

LIBEL AND SLANDER (3)—WORDS IMPUTING CRIME. The intent to charge plaintiff with a crime, in stating that he "or his kids" stole certain articles, is shown by the further statement that defendant saw the articles in plaintiff's barn and intended to have him arrested; and pleading and proof to that effect sufficiently shows a slander.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered January 23, 1919, upon findings in favor of the plaintiff, in an action for slander, tried to the court. Affirmed.

Coleman & Fogarty, for appellant.

Wm. Sheller and *G. F. Cook*, for respondent.

BRIDGES, J.—Respondent brought this action to recover damages of the appellant because of an alleged slander. The complaint alleged that the appellant spoke of and concerning the respondent, to one M. H. Taplin, as follows: "Boyd, or his kids, stole 200 lbs. of logging chains and a bar of two-inch steel and a wagon jack and some other things from me. I saw the bar of steel and the wagon jack in Boyd's barn and was waiting for the other things to show up before I had him arrested, but while I was waiting for the other things to show up, the bar of steel and wagon jack disappeared." A demurrer to the complaint was overruled. The case was tried to the court without a jury. There was a judgment for respondent for $100, from which judgment this appeal is taken.

The appellant first contends that the complaint failed to state a cause of action and that his demurrer thereto should have been sustained. His argument is

[1] Reported in 187 Pac. 342.

that the spoken words did not specifically or sufficiently point out respondent Boyd as being the one charged with the stealing. If the words "Boyd, or his kids, stole 200 lbs. of logging chains and a bar of two-inch steel and a wagon jack from me" had alone been used, then a somewhat different question would arise than that before us. But it is charged that the appellant saw the stolen articles in the respondent's barn and that he intended to have him arrested. It is plain, therefore, that the appellant, in using the words mentioned in the complaint, intended to and did charge the respondent with the theft, and consequently the trial court was correct in overruling the demurrer.

The appellant further contends that the testimony does not justify the judgment. The court found from the testimony that the appellant had spoken of and concerning the respondent practically the words recited in the complaint. Substantially the same argument is made against the sufficiency of the evidence as is made against the sufficiency of the complaint. What we have said concerning the sufficiency of the complaint is applicable to the sufficiency of the evidence. It is our opinion that it was amply sufficient.

Both appellant and respondent cite many cases involving charges against a class of people or against a family or several members of a family. We do not find it necessary to enter this branch of the discussion. We think there was amply sufficient said by the appellant to show that he specifically charged the respondent with theft.

The judgment is affirmed.

Holcomb, C. J., Fullerton, Tolman, and Mount, JJ., concur.

[No. 15609. Department One. January 28, 1920.]

GEORGE R. COLE, *as Executor etc., Appellant,* v. W. G. PETERSON *et al., Respondents.*[1]

EVIDENCE (79)—BEST AND SECONDARY EVIDENCE—PRELIMINARY SEARCH. It is error to admit secondary evidence of the contents of a writing where there was no proof of any search or effort to find and produce the instrument.

Appeal from a judgment of the superior court for King county, Honorable Ivan L. Hyland, Judge *pro tempore,* entered August 7, 1919, upon findings in favor of the defendants, in an action of unlawful detainer, tried to the court. Reversed.

George B. Cole and *John Wesley Dolby,* for appellant.

MITCHELL, J.—Plaintiff sued in unlawful detainer in a case of a month to month tenancy, after default in the payment of rent and service of the statutory notice to pay or quit the premises. The complaint is in the usual form. The answer contained important denials and an alleged affirmative defense. The case was tried without a jury, resulting in a judgment for defendants, from which the plaintiff has appealed.

Appellant insists the so-called affirmative defense is not allowable in this kind of an action, but we find it unnecessary to decide the point, for two reasons:

First. It rests upon an alleged written instrument that was not produced at the trial, secondary evidence of the contents of which was erroneously admitted over the objections of appellant, there being no proof of any search or effort on the part of respondents to find and produce the instrument. *Case Threshing Machine Co. v. Wiley,* 89 Wash. 301, 154 Pac. 437.

[1] Reported in 187 Pac. 368.

Second. The evidence does not satisfy us by a preponderance thereof that the instrument referred to by the defense was not one which had been canceled by a writing signed and acknowledged by the parties in interest at a time prior to the commencement of the tenancy.

The record shows the allegations of the complaint were established by a preponderance of the evidence.

The judgment is reversed, and the cause remanded to the trial court to enter judgment in favor of appellant according to the demands of the complaint and those provisions of § 827, Rem. Code, relating to the judgment in case of unlawful detainer after default in the payment of rent.

HOLCOMB, C. J., PARKER, MAIN, and MACKINTOSH, JJ., concur.

[No. 15302. Department Two. January 29, 1920.]

JAMES T. HENDRYX *et al., Appellants,* v. R. W. TURNER, *Respondent.*[1]

WORK AND LABOR (4)—IMPLIED CONTRACT—RELATIONSHIP OF PARTIES—BROTHER-IN-LAW. Where a husband and wife reared an infant son of the wife's deceased sister at the instance of the brother-in-law, the relationship of the parties is not such as to rebut the presumption of an implied contract to pay for the services, and does not bar recovery without any express contract to pay, in the absence of any family relation between the parties involved.

SAME (11)—PLEADING—ISSUES, PROOF AND VARIANCE. A complaint alleging the performance of special services at the special instance and request of defendant and that the reasonable value was a certain sum, states a cause of action on *quantum meruit* or implied contract, notwithstanding an allegation that defendant agreed to pay such reasonable compensation, which amounts only to a conclusion of law, and authorizes recovery without proof of an express contract.

[1]Reported in 187 Pac. 372.

SAME (4, 14) — IMPLIED CONTRACT—EVIDENCE—SUFFICIENCY. An action on *quantum meruit* for rearing a child is sustained by plaintiff's evidence that they never intended to make any charge because the child had been given to them to rear as their own, until, in habeas corpus proceedings by the father, the child had been taken from them on the father's evidence that the child had not been given to them; since eliminating evidence of such gift as inapplicable, the law implies a promise to pay from the other established facts.

Appeal from a judgment of the superior court for Clarke county, Back, J., entered November 30, 1918, upon granting a nonsuit, dismissing an action on contract, tried to the court. Reversed.

John C. McCue and *G. L. Davis,* for appellants.

W. W. Sparks and *McMaster, Hall & Drowley,* for respondent.

BRIDGES, J.—By this action appellants, plaintiffs below, sought to recover of the respondent compensation for the maintenance and care of Charles R. Turner, the son of the respondent. On December 12, 1911, the appellants and respondent and his wife, since deceased, were neighbors, residing in the state of Washington. Mrs. Turner and Mrs. Hendryx were devoted sisters. On the day above mentioned, the child Charles R. Turner was born by Mrs. Turner, who died within two or three hours thereafter. Mrs. Hendryx was present at the birth and the death. At that time the respondent, father of the child, requested the appellants to take the child and care for him, which the appellants at once proceeded to do. They kept the child until January, 1918. Shortly prior to that time the respondent, who had remarried, desired, and demanded of the appellants, the possession and custody of the child, but the appellants refused to surrender him. They contended that there was an express agreement between them and the respondent, made at the

time the child was given to them, that he was to become and remain their own child in consideration of his upbringing by them. A few days after this demand, the respondent brought an action of habeas corpus against the appellants, in the circuit court of the state of Oregon. In that proceeding the appellants seem to have defended on the ground that the child had been given to them and that he was their child. The respondent denied that the child had been given to the appellants as their own and contended that he had merely been temporarily placed in their care and custody. This case went to the supreme court of the state of Oregon, where it was held that the child had never been given to the appellants in such manner as to make him their own, and they were required and ordered to surrender possession of him into the custody of his father, the respondent. See *Turner v. Hendryx,* 86 Ore. 590, 167 Pac. 1019, 169 Pac. 109. In that action the appellants testified that they had never demanded and had never expected any compensation from respondent because they considered the child to be their own.

After the child was taken from them by virtue of the decree of the Oregon supreme court, appellants instituted this action in this state for the purpose of getting compensation for their services and expenses incurred. Their complaint alleged that appellants, on December 12, 1911, at the special instance and request of the respondent, took the child into their possession and continued thereafter to care for, maintain and support him until the 12th day of January, 1918. The third paragraph of the complaint alleged that "defendant agreed to pay to plaintiffs for their said work, labor and services as aforesaid the reasonable value thereof." The reasonable value was alleged to be $2,735. The answer denied most of the material alle-

gations of the complaint and affirmatively pleaded the habeas corpus proceeding in the courts of Oregon. The testimony here of Mrs. Hendryx, the appellants' chief witness, was in entire accord with her testimony in the habeas corpus proceeding. She said that, on the evening her sister died, Turner told her that he would have to leave the child with her; that he could not take care of him, and that she told Turner she was willing to take the child and raise him, providing he was given to her as her own child, and that the respondent agreed to those terms; that, in accordance with this arrangement, she did take the child and rear him as one of her own family for the period heretofore mentioned. At that time she and her husband lived in Washington, but later removed to Portland, Oregon. She testified that there never was any agreement for, or talk concerning, compensation until shortly before the institution of the habeas corpus proceeding; that, up to that time, she had no intention or expectation of making any charge for her services because she considered the child to be her own. There was ample testimony showing the reasonable value of her services to the respondent's child. At the close of appellants' case, the respondent moved for a nonsuit, which was granted, and judgment was thereafter entered dismissing the action, from which judgment this appeal is taken.

The trial court seems to have granted the nonsuit on two grounds; first, that the testimony showed that the parties to this action were related and were of one family, and therefore the law would not imply any agreement to pay compensation; and second, because the complaint was rested upon an express contract to pay, and, since there was no testimony in support of an express contract, there could be no recovery.

Generally speaking, where one performs services for another at that other's special instance and request, and there is no agreement with reference to compensation, the law will imply an agreement on the part of the other to pay what the services are reasonably worth. This rule, of course, is based upon the theory that human experience teaches that, under such circumstances, the one expects to receive and the other expects to pay, notwithstanding nothing is said about compensation. But this rule is not universal. Where the relationship of the parties is so close and intimate as to rebut the presumption of an implied contract to pay, there can be no recovery except upon an express agreement. Where one renders services as a member of the family of the person served, receiving support therein, a presumption of law arises that such services are gratuitous, and to authorize a recovery therefor an express promise of the party served must be shown, or such facts and circumstances as will authorize a finding that the services were rendered in the expectation by the one of receiving and by the other of making compensation therefor. There is a long line of decisions in support of this doctrine, but it is not necessary to go outside of the decisions of this court to find such support. In the case of *Morrissey v. Faucett*, 28 Wash. 52, 68 Pac. 352, this court said:

"It is a rule universally recognized that, when the services are rendered by one who is a member of the family of the employer, the law will not imply a contract to pay for the services from the mere fact that they have been rendered upon the one hand and benefits thereof received upon the other, as in the case of strangers. This is also held to be the rule when there is no actual blood relationship existing between the parties, provided they sustain to each other the ordinary relations of members of the same family."

To the same effect see the following: *McBride v. McGinley,* 31 Wash. 573, 72 Pac. 105; *Hodge v. Hodge,* 47 Wash. 196, 91 Pac. 764, 11 L. R. A. (N. S.) 873; *Pelton v. Smith,* 50 Wash. 549, 97 Pac. 460.

The testimony in this case is clearly insufficient to authorize any recovery based upon an express agreement, and if appellants recover at all they must do so upon an implied agreement. The respondent contends that the relationship of the parties to this action is such as to bring them within the exception to the general rule as recognized by the authorities above cited, and for that reason the appellants cannot recover on the theory of an implied contract. We cannot agree with the respondent's contention in this regard. There is no blood relationship between either of the appellants and respondent. They did not live together as one family, but, on the contrary, there was an entire absence of family relationship. If this had been a controversy between the appellants and the child in question, whereby the appellants sought to recover of the child compensation for their care and custody of him, or whereby the child had sought to recover of appellants compensation for his services rendered to them, a very different question would arise. All, or practically all, of the cases cited by respondent are cases of the character supposed. The case of *Wyley v. Bull,* 41 Kan. 206, 20 Pac. 855, was one where the plaintiff, a minor, but not a relative of defendant, residing with the defendant as his son and as one of his family, sought to recover compensation for his services. The case of *Price v. Price's Ex'r,* 19 Ky. Law 211, 39 S. W. 429, was one where a sister sought to recover compensation from the estate of her deceased brother for services rendered by her. The case of *James v. Gillen,* 3 Ind. App. 472, 30 N. E. 7, was one where a niece entered the family of the decedent and there lived with

him as his own child and as a part of the family, and she instituted suit to recover compensation for services performed by her. Most, if not all, of the other cases cited by respondent are like those we have noticed. It should at once be manifest, we think, that there is a very wide difference between the facts of those cases and the facts of the case at bar.

The respondent further insists that appellants' action is based upon express contract, and for that reason there cannot be any recovery on implied contract. While there are some expressions in the complaint that would tend to indicate that it was the intention to plead an express contract, yet, taking that instrument as a whole, we are satisfied that it was the intention to rely upon an implied contract. The complaint alleged, in substance, that the appellants performed the services at the special instance and request of the respondent and that the reasonable value of such services was a certain sum. These are the usual allegations contained in a complaint based upon *quantum meruit*. The allegation to the effect that respondent agreed to pay such reasonable compensation is nothing more than a conclusion of law, and, of course, surplusage.

At page 587, 6 R. C. L., we find the following:

"It is said that the only difference between an express contract and an implied contract is that in the former all the terms and conditions are expressed between the parties, while in the latter some one or more of the terms and conditions are implied by law from the conduct of the parties."

The following rule is laid down in 23 Am. & Eng. Ency. (2d ed.), 534:

"Where a person employs another to do work for him, without any agreement as to compensation, the law implies a promise to pay for the services as much

as they may deserve or merit. In such case the plaintiff may suggest in his declaration that the defendant promised to pay him as much as he reasonably deserved, and then aver that his trouble was worth such a sum of money, which the defendant has omitted to pay. This is called an assumpsit on a *quantum meruit.*"

See, also, *Jackson v. Buice,* 132 Ga. 51, 63 S. E. 823; *Forester v. Forester,* 10 Ind. App. 680, 38 N. E. 426, 2 R. C. L. 747; *Bertelson v. Hoffman,* 35 Wash. 459, 77 Pac. 801; *Thayer v. Harbican,* 70 Wash. 278, 126 Pac. 625; *Holm v. Chicago, Milwaukee & P. S. R. Co.,* 59 Wash. 293, 109 Pac. 799.

The respondent contends that, even if the complaint is based upon an implied contract, the testimony negatives any implied promise to pay. In discussing this feature of the case, it is necessary to remember that appellants testified that, up to the time the child was taken away from them, they had no intention of making any charge, and that at no time had there been any talk concerning compensation, because appellants always considered the child to be their own. But the supreme court of Oregon, in the habeas corpus case cited, held, in substance, that the child did not belong to the appellants, and that there never was any legal or binding contract between appellants and respondent whereby the latter legally surrendered his child to the former. We must, therefore, eliminate from this case, as inapplicable thereto, the appellants' testimony to the effect that they were given the child. With this testimony eliminated, we have nothing left but the bare fact that appellants have cared for the child all these years at the request of respondent. Based upon that testimony, the law will imply a promise on the part of respondent to pay the reasonable value of such services.

Our conclusion is that the complaint was based upon an implied contract, and that the appellants offered sufficient testimony to require their case to be submitted to the jury, and that the court was in error in granting a nonsuit. Judgment is reversed and the case remanded with instructions to proceed with the trial in accordance herewith.

HOLCOMB, C. J., TOLMAN, FULLERTON, and MOUNT, JJ., concur.

[No. 15581. Department Two. January 29, 1920.]

FISHER FLOURING MILLS COMPANY *et al., Respondents,* v. FRED C. BROWN, *Prosecuting Attorney of King County, et al., Appellants.*[1]

STATUTES (14)—SUBJECTS AND TITLES. The title to Laws 1919, p. 248, *et seq.*, referring to the "adulteration" of concentrated commercial feeding stuffs sufficiently expresses the subject-matter of § 3 (as required by Const., art. 2, § 19), which limits to ten per cent the amount of crude fiber in the feeds enumerated; since "adulteration" in the title applies to the addition of weaker or less nutritious substances and not merely to foreign substances.

CONSTITUTIONAL LAW (48, 116, 134) — REGULATION OF TRADE OR BUSINESS—POLICE POWERS—EQUAL PROTECTION OF THE LAWS—DUE PROCESS. The state and Federal constitutional guarantees of due process and equal protection of the laws do not apply to laws enacted by the state legislature in the exercise of its police powers; hence Laws 1919, p. 248 *et seq.*, relating to the adulteration of concentrated feeding stuffs, enacted for the protection of dairymen and stockmen, does not violate Const., art. 1, §§ 3 and 12, or the 14th amendment to the Federal constitution; notwithstanding that some innocuous feed stuffs are incidentally included within the prohibition of the law.

Appeal from an order of the superior court for King county, Gilliam, J., entered August 15, 1919, granting a temporary injunction restraining the defendants

[1] Reported in 187 Pac. 399.

from enforcing certain provisions of the concentrated commercial feeding stuffs act, after a hearing before the court. Reversed.

The Attorney General, Glenn J. Fairbrook, Assistant, Fred C. Brown, and *Howard A. Hanson* (*Chas. S. Gleason, E. L. Skeel,* and *Earl G. Rice,* of counsel), for appellants.

Donworth, Todd & Higgins (*Hyman Zettler,* of counsel), for respondents.

MITCHELL, J. — This is an appeal from an order granting a temporary injunction restraining the defendants from enforcing so much of the concentrated commercial feeding stuffs act, enacted by the legislature of 1919, as purports to limit to ten per cent the amount of crude fibre which the feeds enumerated in § 1 of the act may lawfully contain. The act in question is ch. 101, page 248 *et seq.*, Laws of 1919. The sections thereof material to this case are 1, 2, 3, 4, 6 and 10, and are as follows:

"Section 1. The term 'concentrated commercial feeding stuffs' as used in this act shall include linseed meals, cocoanut meats, gluten feeds, sugar feeds, dried brewer's or distiller's grains, malt sprouts, feeds made from ground cereals or by-products therefrom, including slaughter-house waste products when sold as feeds, mixed feeds, and mixed meals made from seeds or grains, and all materials of similar nature used for food for domestic animals, condimental feeds, stock feeds, and all patented proprietary or trade stock and poultry feeds for which nutritive value is claimed, but it shall not include hay or whole seeds, or unmixed meals made from entire grains of wheat, rye, barley, oats, corn, or other cereals, nor wheat flour or other flours.

"Sec. 2. Before any concentrated commercial feeding stuff is sold, offered or exposed for sale in Washington, the manufacturer, importer, dealer, agent, or

person who causes it to be sold or offered for sale, by sample or otherwise, within this state, shall file with the Commissioner of Agriculture a statement that he desires to offer such concentrated commercial feeding stuff for sale in this state, and also a certificate, the execution of which shall be sworn to before a notary public, or other proper official, for registration, stating the name, brand or trade-mark under which the concentrated commercial feeding stuff will be sold, and the minimum percentage of crude fat and crude protein and maximum per cent of crude fibre (allowing 1 per centum nitrogen to equal 6.25 per centum of protein) which the manufacturer or person offering the concentrated commercial feeding stuff for sale guarantees it to contain, these constituents to be determined by the methods recommended by the association of official agricultural chemists of the United States.

"Sec. 3. Any person, company, corporation or agent, that shall sell, offer or expose for sale, any concentrated commercial feeding stuff in this state shall state in the invoice of every bulk shipment, shall affix or cause to be affixed to every package or sample of such concentrated commercial feeding stuff, in a conspicuous place on the outside thereof, a tag or label, which shall be accepted as a guarantee of the manufacturer, importer, dealer, or agent, and which shall have plainly printed thereon, in the English language, the number of net pounds of concentrated commercial feeding stuff in the package or bulk shipment, the name, brand or trade-mark under which the concentrated commercial feeding stuff is sold, the name and address of the manufacturer, importer, dealer or agent, the guaranteed analysis stating the minimum percentage of crude fat and crude protein and maximum per cent of crude fibre, which shall not exceed ten per cent (10%), determined as described in section 2, and the ingredients from which the concentrated commercial feeding stuff is compounded. The agency distributing to users of such feed in less than carload lots shall deliver to the purchaser of each lot regardless of quantity sold a bill showing current analysis of such feeding stuffs.

"Sec. 4. Any person, company, corporation, or agent, that shall offer or expose for sale, or sell, any package or sample or any quantity of any concentrated commercial feeding stuff which has not been registered with the Commissioner of Agriculture, as required by section 2, or which does not have affixed to it the tag or label required by section 3, or which is found by analysis made by or under the direction of the chemist of Washington Agricultural Experiment Station to contain a smaller percentage of crude fat or protein or larger percentage of crude fibre than stated in the guarantee, or who shall affix a tag or label which is false or inaccurate in any respect, or who shall adulterate any concentrated commercial feeding stuff, or who shall adulterate with any substance injurious to the health of domestic animals, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in the sum of one hundred dollars ($100.00) for the first offense, and in the sum of five hundred dollars ($500.00) for each subsequent offense. In all litigation arising from the purchase or sale of any concentrated commercial feeding stuff, in which the composition of the same may be involved, a certified copy of the official analysis, signed by the chemist of the Washington Agricultural Experiment Station, shall be accepted as *prima facie* evidence of the composition of such concentrated commercial feeding stuff: *Provided,* That nothing in this act shall be construed to restrict or prohibit the sale of concentrated commercial feeding stuff in bulk to each other by importers, manufacturers, or manipulators who mix concentrated commercial feeding stuffs for sale, or as preventing the unrestricted shipment of these articles in bulk to manufacturers or manipulators of concentrated commercial feeding stuffs for sale, or to prevent the State Experiment Station, or any person or persons authorized by the State Experiment Station, from making experiments with concentrated commercial feeding stuffs for the advancement of science in agriculture.

"Sec. 6. It shall be unlawful to include in any concentrated commercial feeding stuff, any buckwheat hulls, rice hulls, cottonseed hulls, peanut hulls, oat

hulls, peanut shells, corn cobs, cocoanut shells, ground or shredded straw, sawdust, cellulose, dirt, damaged or decayed feed, mill, elevator or other sweepings or dust, marble dust, or any injurious, deleterious, or, for feeding purposes, worthless or damaged ingredient.

"Sec. 10. It shall be the duty of the state attorney general or the prosecuting attorneys of the several counties of this state, to cause proceedings to be commenced against any person or persons whom the Commissioner of Agriculture shall report to have violated any section of this act, and to prosecute the same in the manner required by law."

Other sections make general provisions for the enforcement of the act, including such rules and regulations as the commissioner of agriculture may deem necessary.

The complaint alleges that plaintiffs are, and for years have been, engaged in the manufacture in this state of certain named concentrated commercial feeding stuffs, which contain over ten per cent crude fibre, in which they do an extensive business, and that such feeding stuffs are wholesome and beneficial for domestic animals and are in general use by feeders throughout the state; that the limiting of the crude fibre content to ten per cent is arbitrary and in violation of all custom and precedent, and no other law has ever been enacted in any state or country restricting the crude fibre content in such feeds to any percentage at all approaching ten; that, in this state, there are numerous mills manufacturing breakfast and cereal foods for human consumption, such as oatmeal, rolled oats, and other preparations of oats, wheat and barley, and many flouring mills, all of which manufactories and mills produce large quantities of oat by-products, wheat bran, wheat mill feed, barley shorts and screenings, and other by-products that are of great value for animal feed; and for years, here and

throughout the United States, all such by-products have been used for animal feed by combining them with other wholesome feed substances; that to prohibit such combinations on account of feeds containing an excess of ten per cent of crude fibre is arbitrary and unreasonable and would result in the total loss and waste of such by-products; that the enforcement of said clause limiting the fibre content of such feeds would deprive plaintiffs of the right guaranteed by the constitution of the United States to engage in lawful and ordinary business, would seriously impair and destroy the established business of each of the plaintiffs, would prevent each plaintiff from making lawful contracts for the sale of wholesome feeds, and would discriminate unlawfully between feeds now manufactured by them and other feeds containing ten per cent or less of crude fibre, on a purely arbitrary basis; that the ten per cent crude fibre clause is unconstitutional because not covered by or included within the title to the act; and that in all other respects the act is valid and commendable. Against the proposed enforcement by defendants of the ten per cent clause as to crude fibre, an injunction is prayed for, as well as a judgment that the clause be declared invalid.

As it already appears, the provision or language objected to is, "which shall not exceed ten per cent (10%)," immediately following the words "maximum per cent of crude fibre," in § 3 of the act. The provision of the state constitution claimed to be violated is § 19, art. 2, as follows:

"No bill shall embrace more than one subject, and that shall be expressed in the title."

The act is designated or named "Concentrated Commercial Feeding Stuffs," and is more specifically entitled as follows:

"An act to provide for registration and guarantee of composition of concentrated commercial feeding stuffs, providing against the adulteration of such feeding stuffs, declaring violation of its provisions to be a misdemeanor and providing a penalty therefor, and requiring the attorney general and prosecuting attorneys to prosecute violations thereof."

No aid to the clause in question is to be found in the latter part of the specific title, beginning with the words, "declaring violation." So that the question of the sufficiency of the title to cover the language objected to must be answered by those words of the title as follows:

"An act to provide for registration and guarantee of composition of concentrated commercial feeding stuffs, providing against the adulteration of such feeding stuffs, . . ."

There is a wealth of authority and manner of expression in this state and elsewhere in defining the purpose and application of this or similar constitutional provisions. In the early case of *Lancey v. King County*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817, referring to the provision in question, this court said:

"It is well settled, however, by the weight of authority, that an act of the legislature will not be declared void except in cases where the violation of this constitutional inhibition is most clear, and sound policy and legislative convenience require that this provision should be liberally construed."

As late as the case of *Holzman v. Spokane*, 91 Wash. 418, 157 Pac. 1086, this court said:

"This court has always liberally construed the constitutional requirement that the subject-matter of an act of the legislature shall be expressed in its title, and has deferred to legislative discretion touching that requirement, except in cases of its plainest violation. The doctrine that all reasonable doubts as to the con-

stitutionality of an act of the legislature should be resolved in favor of upholding the act has peculiar force in the solution of the question of whether or not the act has been in form constitutionally passed, because such a constitutional question has to do with legislative procedure. In other words, it has to do with the methods of transacting public business by a co-ordinate branch of the state government, and not with those constitutional guaranties of personal rights which it is the peculiar province of the courts to protect."

It may be admitted that the provision for the registration and guarantee of composition affords of itself no foundation for including in the act the clause objected to; but the title goes further and expresses the purpose to provide "against adulteration of such feeding stuffs," not necessarily mixing in some foreign substance that is *per se* obnoxious or an adulterant, but the adding to the more valuable portion of the feeding stuffs of any weaker or less nutritious substance, such as crude fibre, although derived, among other ways, as a by-product in the manufacture of food for human beings out of the same kind of grain or grains as that constituting the most valuable portion of the feeding stuffs. Unquestionably the different kinds of feeding stuffs, in their natural state, contain crude fibre in varying degrees, and it is to be noticed that, by the concluding words in § 1 of the act, it is provided that the term "concentrated commercial feeding stuffs" "shall not include hay or whole seeds, or unmixed meals made from entire grains of wheat, rye, barley, oats, corn, or other cereals, nor wheat flour or other flours."

Section 1 of the act enumerates what are included in the term "concentrated commercial feeding stuffs," and, among others, mentions "mixed feeds, and mixed meals made from seeds or grains, and all materials

of similar nature used for food for domestic animals, condimental feeds, stock feeds, and all patented proprietary or trade stock and poultry feeds for which nutritive value is claimed," which evidently are capable of being adulterated. To the ordinary mind, and possibly to the critical mind, the word "adulterate" means to reduce in quality, to weaken, to make less valuable. Mr. Webster defines it: "To corrupt, debase, or make impure by an admixture of a foreign or a baser substance."

In the case of *St. Louis v. Jud,* 236 Mo. 1, 139 S. W. 441, cited by respondent, in defining the word and giving Webster's definition, the court says:

"That standard work illustrates the application of the word. It states that articles are adulterated 'to improve or change their appearance or flavor in imitation of an article of higher grade or of a different kind.' Adulteration is a 'treatment to simulate a better article'; an 'artificial concealment of defects.'"

Indeed, in this state, we are not without a statutory definition, as applied to foods, to practically the same effect. In 1899 (session laws, page 183), in an act to provide against the adulteration of food, it is declared that an article should be deemed adulterated if, among other things, "any valuable or necessary constituent or ingredient has been wholly or in part abstracted from it." In 1901 (session laws, page 195), upon the same subject, it was provided that an article should be deemed adulterated if, among other things, "any valuable constituent of the article has been wholly or in part abstracted so that the product when sold shall deceive or tend to deceive the purchaser." And again, in 1907 (session laws, page 479), extending the law to include food for animals as well as persons, it was declared that food should be deemed adulterated if, among other things, "any valuable constituent of the

article has been wholly or in part abstracted." (Rem. Code, § 5455.)

Since the evident purpose of the present act is to protect the consumer from what the legislature considers inferior articles of concentrated commercial feeding stuffs, it is difficult to understand why a prohibition against importing into the feeding stuffs the baser constituent elements of other similar natural feeds is not germane to the words in the title of the act against adulteration, since we find that, by legislative enactments, although in other acts upon the subject of the adulteration of foods, the process of abstracting in whole or in part the valuable contents of natural foods is declared to constitute adulteration. Just now we are not dealing with the matter of the preciseness of the limit of ten per cent of crude fibre, but only the question of whether or not the inclusion of any expression on that subject is permissible under the title of the act and the limitation provided in the state constitution.

Eliminating the name "Concentrated Commercial Feeding Stuffs" given to the act by the legislature, and looking only to the language of the title specifically defining the subject of the act, counsel for respondents invoke the familiar rule stated in the case of *Percival v. Cowychee & Wide Hollow Irr. Dist.*, 15 Wash. 480, 46 Pac. 1035, as follows:

"A title may be as broad as the legislature sees fit to make it, and thereunder any specific legislation, as to any subject relating to the general matter thus broadly embraced in the title, sustained. But when it sees fit to adopt a restricted title and thereunder attempts to enact provisions not fairly within such restricted title, such provisions cannot be given force by reason of the fact that it would have been competent for the legislature to have adopted a more generic

title and thereunder properly included all of the provisions of the act."

Supporting the same rule, counsel cite: *Sengfelder v. Hill,* 21 Wash. 371, 58 Pac. 250; *Armour & Co. v. Western Const. Co.,* 36 Wash. 529, 78 Pac. 1106; *State ex rel. Nettleton v. Case,* 39 Wash. 177, 81 Pac. 554, 109 Am. St. 874, 1 L. R. A. (N. S.) 152; *State v. Merchant,* 48 Wash. 69, 92 Pac. 890; *Bradley Eng. & Mach. Co. v. Muzzy,* 54 Wash. 227, 103 Pac. 37; *State ex rel. Arnold v. Mitchell,* 55 Wash. 513, 104 Pac. 791, together with other similar cases from this and other jurisdictions.

There is no quarrel with that line of cases. They are strictly according to the constitutional provision in question. It will be found that, in each of those cases, there was involved some subject dealt with in the act which the court decided was not taken care of in the wording of the title to the act, just as is claimed here. To illustrate, in the case of *Percival v. Cowychee & Wide Hollow Irr. Dist., supra,* the title of the act was "An act providing for the organization and government of irrigating districts and the sale of bonds arising therefrom, and declaring an emergency." It was held that the title was not broad enough to embrace a provision in the act for validating indebtedness of a previously organized district and levying a tax to pay the same. It was a case in which the act embraced matter in addition to, or, rather, not germane to, anything expressed in the title. That is the rule. Here, however, there is a title which, within the restricted portion to which we have confined ourselves, enumerates three purposes concerning the subject of concentrated commercial feeding stuffs, namely: (1) registration of the composition; (2) guarantee of the composition; and (3) providing against the adulteration of feeding stuffs; and under the settled rule

of liberality of construction of this provision of the state constitution, and the reasons given for that rule, we are of the opinion that the clause limiting the crude fibre content to ten per cent is germane to, and covered by, the latter, or third, purpose of providing against adulteration.

This conclusion is fortified by another consideration. Counsel for respondents admit the outlawed articles mentioned in § 6 of the act are properly proscribed and that such provision is well within the title of the act. If so, it is because § 6 is taken care of by those words of the title providing against adulteration; and it would appear that any other provision, such as the ten per cent fibre clause, manifestly intended, at least presumably intended and well calculated to aid in an effective enforcement of the prohibited use of the articles mentioned in § 6 of the act, is of itself provided for in the title of the act. Both are meant to provide against adulteration, the one not beyond ten per cent fibre, and the other not to be used at all. True, in the complaint it is alleged respondents favor, and do not propose to violate, the terms of § 6 of the act; but that is not the test, for the controversy here is over another provision which may of itself, or in conjunction with the terms of § 6, prevent all persons within the state, or to come into the state, whether they be respondents or others, from handling concentrated commercial feeding stuffs that contain more than ten per cent crude fibre.

It is further argued that the enforcement of the ten per cent fibre clause of the act, under the circumstances in which the respondents are situated, would violate § 3, art. 1, of the state constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law; and also § 12 of the same article which guarantees equal protection to

all citizens; and also § 1 of the fourteenth amendment to the Federal constitution extending the same protection as those portions of the state constitution just above referred to.

It is well understood that those provisions of the constitutions do not apply to laws enacted by a state legislature in the exercise of its police power. *Powell v. Pennsylvania,* 127 U. S. 678.

In the case of *State v. Pitney,* 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A 209, the police power of a state is declared

"to include all those regulations designed to promote the public convenience, the general welfare, the general prosperity, and extends to all great public needs, as well as regulations designed to promote the public health, the public morals, or the public safety."

And marking the way for our present pursuit, citing and quoting from the cases of *Munn v. Illinois,* 94 U. S. 113, and *Home Telephone & Telegraph Co. v. Los Angeles,* 211 U. S. 265, it was further said in the *Pitney* case:

"In determining whether the provisions of a law bring it within the police power, it is not necessary for the court to find that facts exist which would justify such legislation. If a state of facts can reasonably be presumed to exist which would justify the legislation, the court must presume that it did exist and that the law was passed for that reason. If no state of circumstances could exist to justify the statute, then it may be declared void because in excess of the legislative power."

Manifestly, the object of the legislature in protecting the vast and increasing number of users of concentrated commercial feeding stuffs in this state against the adulteration of the articles is within the police power; and in exerting this authority it is at liberty to adopt such measures, having reasonable re-

lation to that end, as it may deem necessary to make its action effective. Upon this subject, in the case of *Purity Extract & Tonic Co. v. Lynch,* 226 U. S. 192, it was said:

"With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature,—a notion foreign to our constitutional system."

A careful examination of the case of *Powell v. Pennsylvania, supra,* later approved in *Hammond Packing Co. v. Montana,* 233 U. S. 331, will discover sufficient reasons for, and the highest authority to sustain, the provision of the act of 1919 now in controversy as affected by those provisions of the state and Federal constitution referred to. That case involved the right of the state to forbid the sale of oleomargarine manufactured in the state. The defendant was charged with the violation of an act entitled: "An act for the protection of dairymen, and to prevent deception in sales of butter and cheese," in that he sold what in effect was oleomargarine, being an imitation of butter. The defendant offered to prove that the article he sold was pure and wholesome, that the process of its manufacture was clean, and that the article contained the same elements as dairy butter, the only difference being that the manufactured article he sold contained a slightly smaller percentage of fatty substance known as butterine; that, in connection with his business in the sale of the article, he had made large investments in real estate, buildings and necessary machinery and ingredients; that he made large profits in his traffic in the article, and if prevented from continuing in it the

value of his property would be lost and he would be deprived of the means of a livelihood. The court said the purpose of his proof was avowed to show, *inter alia,* that the article was not an adulteration of dairy products, nor injurious to the public health, but wholesome and nutritious, and that its manufacture and sale were in conformity to certain laws of the state; and also to show that the statute upon which the action was founded was unconstitutional and not a lawful exercise of the police power, and also because it deprived the defendant of the lawful use of his property, liberty and faculties and destroyed his property without making compensation. The trial court sustained an objection to the offered testimony as being immaterial and irrelevant. The supreme court sustained the ruling. The main argument against the law was that it violated § 1 of the fourteenth amendment to the Federal constitution. In speaking upon the merits of the case, the court said:

"It will be observed that the offer in the court below was to show by proof that the particular articles the defendant sold, and those in his possession for sale, in violation of the statute, were, in fact, wholesome or nutritious articles of food. It is entirely consistent with that offer that many, indeed, that most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court cannot say, from anything of which it may take judicial cognizance, that such is not the fact. Under the circumstances disclosed in the record, and in obedience to settled rules of constitutional construction, it must be assumed that such is the fact. 'Every possible presumption,' Chief Justice Waite said, speaking for the court in *Sinking Fund Cases,* 99 U. S. 700, 718, 'is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict ob-

servance of this salutary rule.' See, also, *Fletcher v. Peck,* 6 Cranch, 87, 128; *Dartmouth College v. Woodward,* 4 Wheat. 518, 625; *Livingston v. Darlington,* 101 U. S. 407.

"Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty, and property; and while, according to the principles upon which our institutions rest, 'the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself;' yet, 'in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of public opinion or

by means of the suffrage.' *Yick Wo v. Hopkins,* 118 U. S. 370. The case before us belongs to the latter class. The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government."

True, later, in the case of *Schollenberger v. Pennsylvania,* 171 U. S. 1, relied on by respondents, the court held, after it was shown that oleomargarine contained no substance injurious to health, that it was a lawful article of interstate commerce; as, also, in the case of *Collins v. New Hampshire,* 171 U. S. 30, a state law requiring oleomargarine to be colored pink to entitle it to be sold, was held to be invalid. But still later, in the case of *Hammond Packing Co. v. Montana, supra,* the supreme court dismissed the contention of plaintiff in error, who therein relied on the *Schollenberger* and *Collins* cases, that the state could not prohibit the manufacture and sale of oleomargarine, with the terse statement:

"Apart from interference with commerce among the States, a State may restrict the manufacture of oleomargarine in a way in which it does not hamper that

of butter. *Capital City Dairy Co. v. Ohio,* 183 U. S. 238, 245, 246. It even may forbid the manufacture altogether. *Powell v. Pennsylvania,* 127 U. S. 678."

And, again, the supreme court of the United States has reaffirmed the same doctrine. The state of Ohio had a statute prohibiting the sale of condensed milk unless it was made from unadulterated milk from which the cream had not been removed, and in which the milk solids should equal twelve per cent of milk solids in crude milk, twenty-five per cent of such solids being fat, and requiring the package to be labeled with its true name, etc. The court, in the case of *Hebe Co. v. Shaw,* 248 U. S. 297, in holding that the sale of an article called "Hebe," conceded to be wholesome, but made in part from skimmed, rather than unadulterated milk, was prohibited by the act, said:

"We are satisfied that the statute as construed by us is not invalidated by the Fourteenth Amendment. The purposes to secure a certain minimum of nutritive elements and to prevent fraud may be carried out in this way even though condensed skimmed milk and Hebe both should be admitted to be wholesome. The power of the legislature 'is not to be denied simply because some innocent articles or transactions may be found within the proscribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat.' *Purity Extract & Tonic Co. v. Lynch,* 226 U. S. 192, 204. If the character or effect of the article as intended to be used 'be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury,' or, we may add, by the personal opinion of judges, 'upon the issue which the legislature has decided. *Price v. Illinois,* 238 U. S. 446, 452; *Rast v. Van Deman & Lewis Co.,* 240 U. S. 342, 357, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455. The answer to the inquiry is that the provisions are of a kind familiar to legislation and often sustained and that it is impossible for

this court to say that they might not be believed to be necessary in order to accomplish the desired ends."

Admitting that certain concentrated commercial feeding stuffs, as now manufactured by respondents, containing crude fibre in excess of ten per cent, separately considered, are innocuous, it does not necessarily follow they may not be incidentally included in a prohibition the scope of which is regarded by the law-making power as essential to accomplish a purpose within the power of the legislature. *Purity Extract & Tonic Co. v. Lynch, supra.*

Concerning the maximum allowed of ten per cent fibre, it is obvious upon the face of the provision that the legislature considered and determined the matter according to its judgment; and for us to hold that, in doing so, it transcended its reserved powers, would constitute an unwarranted departure from well understood principles.

We are of the opinion the words complained of are a valid provision of the law; from which it follows that the order granting a temporary injunction must be, and it is, reversed.

HOLCOMB, C. J., PARKER, MACKINTOSH, and MAIN, JJ., concur.

[No. 175. *En Banc.* December 17, 1919.]

In the Matter of the Proceedings for the Disbarment of OTIS JOHNSON.[1]

Proceedings filed in the supreme court September 30, 1919, for the disbarment of an attorney, upon the findings of the state board of law examiners against the accused. Judgment of disbarment.

The Attorney General and *R. M. Burgunder, Assistant,* for the state.

PER CURIAM.—Upon a careful examination of the record in the above entitled matter, a majority of the court adopt and approve the recommendations of the board of law examiners, filed herein on September 30, 1919, that the license of Otis Johnson to practice law in the state of Washington be revoked and that he be disbarred. It is so ordered.

[No. 15575. Department Two. January 12, 1920.]

THE STATE OF WASHINGTON, *Respondent,* v. MIKE CASSASSA, *Appellant.*[2]

Appeal from a judgment of the superior court for Kittitas county, Davidson, J., entered June 6, 1919, upon a trial and conviction of violating the prohibition law. Affirmed.

Pruyn & Hoeffler, for appellant.

Arthur McGuire and *C. R. Hadley,* for respondent.

PER CURIAM.—This appeal presents the questions determined by us in the case of *State v. Giaudrone, ante* p. 397, 186 Pac. 870, and on the authority of that case the judgment will stand affirmed.

[1] Reported in 185 Pac. 549.

[2] Reported in 186 Pac. 872.

[No. 5. *En Banc.* January 19, 1920.]

In the Matter of the Proceedings for the Disbarment of GERARD RYZEK.[1]

Proceedings filed in the supreme court May 17, 1919, for the suspension of an attorney, upon the findings of the state board of law examiners against the accused. Dismissed.

E. A. Davis, *M. M. Moulton*, and *Gerard Ryzek*, for accused.

The Attorney General and *R. M. Burgunder*, *Assistant*, for the state.

PER CURIAM.—In this cause the state board of law examiners, upon investigating charges that Gerard Ryzek was guilty of unprofessional conduct as an attorney at law, has filed the evidence taken, together with its report and recommendation, as provided by law and the rules of court. It recommends that respondent be suspended from the practice of law for a period of sixty days.

Admitting the respect due to the board and the force of its recommendations, we are constrained not to adopt its view in this instance. Upon a consideration of all the evidence, which consists largely of depositions and documents, together with the arguments of respective counsel, we are satisfied the charges are not sustained and the proceedings should be dismissed.

It is so ordered.

[1] Reported in 187 Pac. 364.

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2. SAME (25). In such case, the drawee bank paying the checks cannot recover the sums from the bank passing them through the clearing house, on the ground of the nonexistence of the payees and

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negligence in paying forged checks, upon showing that the person depositing and indorsing the checks and forging the names of the payees was acting under an assumed name as a customer of the passing bank, where such party was at all times insolvent and deposited to a checking account in usual course and there was nothing to put the passing bank upon inquiry; since the vice of the transaction rested in the fact of the fictitious payees, whose existence, under the statute, was admitted by the drawee when it paid them. *National Bank of Commerce of Seattle v. Seattle National Bank* 312

3. SAME (25). A national depositary bank chargeable with notice of the regulation of the Treasury Department requiring checks of a public disbursing officer to state the object or purpose for which any check was drawn cannot claim negligence on the part of other banks not aware of the regulations in causing a loss by passing checks drawn upon the depositary bank to fictitious payees by a public disbursing officer, where for years such depositary bank cashed and passed a stream of such checks by such officer which contained no notation as to their object or purpose, and gave no caution or notice that they were irregular on their face. *National Bank of Commerce of Seattle v. Seattle National Bank* 312

4. BANKS AND BANKING (40)—TRANSFER OF STOCK—IMPLIED WARRANTY. There is no implied warranty on the sale of bank stock by reason of the exhibition of the books of the bank where the seller expressly refused to warrant the correctness of the books. *Luten v. Earles* 550

Bar:

Of action by former adjudication, see JUDGMENT, 4, 5.
Of action by limitation, see LIMITATION OF ACTIONS.

Beneficial Associations:

Mutual benefit insurance association, see INSURANCE, 3-5.

Beneficiaries:

Of reciprocal guaranty agreement, see GUARANTY.
In mutual benefit policy, see INSURANCE, 3-5.

Benefits:

Assessment of for road improvements, see HIGHWAYS, 4, 5.
Mutual benefit insurance, see INSURANCE, 3-5.

Best and Secondary Evidence:

In civil actions, see EVIDENCE, 2, 3,

Bills and Notes:

Parol evidence as to nature and extent of liability, see EVIDENCE, 6.
Limitation of actions on, see LIMITATION OF ACTIONS, 4, 5.

Bills and Notes—Continued.

Assignment of note secured by mortgage, see MORTGAGES, 3.

Authority of partner to execute note in firm name, see PARTNERSHIP, 3.

Authority of agent to indorse checks, see PRINCIPAL AND AGENT, 2.

Recovery against principal after payment of note, see PRINCIPAL AND SURETY.

Warehouse receipts, see WAREHOUSEMEN.

1. BILLS AND NOTES (6)—DRAFTS—ACCEPTANCE—STATUTES — CONDITIONAL ACCEPTANCE. Under Rem. Code, § 3524, providing that an acceptance on a paper other than the bill itself does not bind the acceptor except in favor of the person to whom it is shown and who receives it for value on the faith thereof, a draft accompanying a bill of lading for a car load of shooks was not conditionally accepted or binding on the drawee, where the bank consigning the car received the draft several days prior to presentation and on presentation the drawee refused to accept it but requested that the bill of lading and shipment be forwarded to the purchaser for inspection until which no payment would be made; since the bank did not receive the draft for value on the faith of the acceptance, although it may have relied thereon in forwarding the bill. *Citizens Bank v. Willing* 464

2. BILLS AND NOTES (64, 138)—BONA FIDE PURCHASERS—NOTICE OF MISTAKE—EVIDENCE—SUFFICIENCY. In an assignee's action on a mortgage note and to reform and foreclose the mortgage, findings that by mistake the mortgage fixed the due date one year in advance of the maturity of the note, and that plaintiff had notice of the mistake when he purchased at a large discount, are sustained where the discrepancy appeared on the face of the papers, and he was told of the two dates, and he admitted having had some intimation of it; the presumption of good faith attaching by virtue of Rem. Code, § 3447, being in such case overcome by clear and satisfactory evidence. *Naylor v. Lovell* 409

3. BILLS AND NOTES (90)—PAYMENT OF CHECK—RIGHTS OF PARTIES—"HOLDER." Rem. & Bal. Code, § 3457, of the negotiable instrument law providing that all indorsers warrant to subsequent holders in due course the matters mentioned in the preceding section and engage, in case of dishonor and due notice, to pay the amount thereof to the holder, was not intended to define any obligation or liability to the drawee, who by acceptance, under the terms of Id., § 3453, admits the existence of the payee and his capacity to indorse; since the drawee paying a check is not a "holder" and acceptance and payment strips the instrument of all negotiability. *National Bank of Commerce of Seattle v. Seattle National Bank* 312

Bills and Notes—Continued.

4. BILLS AND NOTES (127)—REFORMATION OF INSTRUMENTS (6, 19)—MISTAKE—EVIDENCE—ADMISSIBILITY. In an action upon a mortgage note and to reform and foreclose the mortgage, alleged in the complaint to have fixed the due date by mistake, parol evidence of the mistake is admissible. *Naylor v. Lovell*..... 409

5. BILLS AND NOTES (138, 146)—ACTIONS—WEIGHT OF EVIDENCE—FRAUD—DURESS. In an action to cancel a note, executed under threat of arrest for theft of defendant's money, the evidence is insufficient to sustain a counterclaim for the amount of the note, where upon the issue as to its appropriation, plaintiff positively declared her ignorance and there was nothing but a flimsy showing, consisting mostly of pure suspicion, to indicate that she had taken it. *Walcott v. Wood* 617

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Supersedeas on appeal, see APPEAL AND ERROR, 9-12.
Change of requirements as to school district bonds as impairing obligation of contract, see CONSTITUTIONAL LAW, 3.
School district bonds, see SCHOOLS AND SCHOOL DISTRICTS.

Boundaries:

Of government lots, see PUBLIC LANDS.

1. BOUNDARIES (1)—NATURAL MONUMENTS. Where the government plat and meander of a stream constituting the boundary between two lots was not founded on gross negligence or fraud, and the stream actually touched both lots and was permanent and visible, it was a natural monument and controlling. *Rue v. Oregon & Washington R. Co.* 436

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Boundaries—Continued.

4. BOUNDARIES (18) — ESTABLISHMENT — RESURVEY. Rem. Code, §§ 947-949, relating to the restoration of lost boundaries by a resurvey does not control actions to quiet title rested upon adverse possession to a line fence the location of which was established by direct evidence. *Samples v. Kergan* 503

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1. BROKERS (4)—AUTHORITY—CONSTRUCTION OF CONTRACT. A broker whose sole authority was to find a purchaser willing to buy a car load of prunes, has no authority to construe the contract or to bind the seller by representing to the purchaser that the term "bulk basis" used in the contract had any meaning other than its accepted trade meaning. *Gile v. Tsutakawa* 366

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4. SAME (3, 18)—EMPLOYMENT—DURATION—NEGOTIATIONS THROUGH OTHER AGENTS. A broker who was given an exclusive agency to sell property for a period of thirty days and thereafter until revoked by written notice, is entitled to commissions upon a sale made through another agent without notice to him. *Brownell v. Hanson* 447

Buildings:

Taxation of on military reservation, see TAXATION.

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To show prejudice from errors alleged, see APPEAL AND ERROR, 23.
As to exception from class, see INTOXICATING LIQUORS, 3.
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By-Laws:

Of mutual benefit societies, see INSURANCE, 3-5.

Calendar:

Dropping case from calendar as termination of attorney's employment, see LIMITATION OF ACTIONS, 2.

Cancellation of Instruments:

Duress in execution of note, see BILLS AND NOTES, 5.
Setting aside fraudulent conveyances, see FRAUDULENT CONVEYANCES.

Carriers:

Regulation of interstate freight rates, see COMMERCE.
Regulation of jitney busses as denial of equal protection of laws, see CONSTITUTIONAL LAW, 5.
Limitation of action to recover freight charges, see LIMITATION OF ACTIONS, 1, 3.

1. CARRIERS (7)—CONTRACTS—TARIFFS. An interstate carrier can enter into no contract of transportation not expressly authorized in its published tariffs. *Pacific Fruit & Produce Co. v. Northern Pacific R. Co.* 481

2. CARRIERS (8-1)—OF GOODS—REFUSAL TO ACCEPT—LIABILITY. It is primarily a carrier's duty to accept a shipment and furnish suitable equipment under a requested optional service, published in its tariff, but it is not liable if its failure was due to an unprecedented shortage of cars and conditions which it could not reasonably anticipate or avoid. *Pacific Fruit & Produce Co. v. Northern Pacific R. Co.* 481

3. SAME (8-1)—REFUSAL TO ACCEPT GOODS—PLEADING—DEFENSES. In a shipper's action for damages to apples frozen in transit, the carrier's answer states a good defense, where it appears that its published tariffs provided an optional service, one at shipper's risk and the other at a higher rate at the risk of the company, which latter required refrigerator cars, that, upon plaintiff's demand for such service, the company used due diligence to obtain refrigerator cars, but from unprecedented conditions was unable to do so, whereupon plaintiff elected to accept the other service, which called for box cars, stoves, and a shipper's attendant, and signed a contract for such service in which he assumed all risks, and that the shipper's loss was due to failure to properly prepare the car and to the negligence of his agent attending the shipment. *Pacific Fruit & Produce Co. v. Northern Pacific R. Co.* 481

Carriers—Continued.

4. CARRIERS (47)—LIVE STOCK—RATES—CONTRACTS—CONSTRUCTION—RESHIPMENTS FROM CONCENTRATION POINTS. Under a tariff contract for the shipment of hogs in single-deck cars to concentration points and billed through, but to be reshipped without rebilling for a long haul in double-deck cars in the ratio of three for each two single-deck car loads, the company cannot recover on the basis of the number of single-deck cars, where, owing to underloading thereof, there were more single-deck cars than three to each two double-deck car loads; but can only recover for the service rendered, which would be the local rate to concentration points on the excess of single-deck cars. *Chicago, Milwaukee & St. Paul R. Co. v. Frye & Co.* 68

5. SAME (47)—LIVE STOCK—RATES—ABANDONED CARS AT CONCENTRATION POINTS. In the absence of a tariff provision covering the matter of freight shipped to concentration points, but billed through and reshipped without rebilling for a long haul in a less number of cars, the company can recover only the reasonable value of the services, which would be the local rate to concentration points upon cars there abandoned. *Chicago, Milwaukee & St. Paul R. Co. v. Frye & Co.* 68

6. SAME (47)—LIVE STOCK—RATES—CONTRACT—ADDITIONAL SWITCHING CHARGES. A contract naming the tariff on through shipments of stock to be delivered at a point where the company had no terminals does not entitle the company to collect, in addition, switching charges, where the shipper stood ready to accept delivery at any point in the city, and the company elected to deliver at the shipper's yards because the switching was less expensive than at other points. *Chicago, Milwaukee & St. Paul R. Co. v. Frye & Co.* 68

Certified Copies:

As evidence in criminal prosecution, see CRIMINAL LAW, 5.

Certiorari:

1. CERTIORARI (6)—WHEN LIES—ADEQUACY OF REMEDY BY APPEAL. Certiorari does not lie to review a judgment enjoining a city from the prosecution of public work, on the ground that the remedy by appeal is inadequate, where it merely appears that the time for performance of the contract will expire before the appeal can be heard and the delay would cause inconvenience to the contractor and city, since the appeal will afford a complete remedy. *State ex rel. Kent v. Superior Court* 336

2. CERTIORARI (30)—SCOPE AND EXTENT OF REVIEW—MERITS. Under Rem. Code, § 1010, limiting the questions involving the merits upon certiorari to whether there was any competent proof of the facts necessary to be found, and, if so, whether there was such a prepon-

Certiorari—Continued.

derance of evidence against the finding as to warrant setting aside of a verdict by a jury, the superior court cannot weigh the evidence and split the difference between two expert witnesses, upon certiorari to review findings of a board of appeals as to unsafe buildings condemned by the city building superintendent. *State ex rel. Tingstead v. Johnson* 214

Charges:

For carriage of freight, see CARRIERS, 4-6.
To jury in criminal prosecutions, see CRIMINAL LAW, 10-12.
To jury in civil actions, see TRIAL, 7.

Chattel Mortgages:

As fraudulent conveyances, see FRAUDULENT CONVEYANCES, 2.

Checks:

Payment of forged paper, see BANKS AND BANKING, 1-3.
Holder of in due course, see BILLS AND NOTES, 3.
Authority of agent to indorse, see PRINCIPAL AND AGENT, 2.

Child:

Custody of on divorce, see DIVORCE, 4, 5.

Cities:

See MUNICIPAL CORPORATIONS.

Citizens:

Equal protection of laws, see CONSTITUTIONAL LAW, 5.

Civil Service:

Application to municipal agents and employees, see MUNICIPAL CORPORATIONS, 1.

Claims:

Against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 1, 2.
Against municipal corporations, see MUNICIPAL CORPORATIONS, 17, 18.

Class Legislation:

See CONSTITUTIONAL LAW, 4, 5.

Clean Hands:

Rule of equity that complainant must come with clean hands, see EQUITY.

Coal Lands:

Consideration for contract relating to relinquishment of conflicting claims to, see CONTRACTS, 3.

Cohabitation:

Presumption arising from, see MARRIAGE.

Collateral Security:

See PLEDGES.

Collision:

Between vehicles or with persons using streets, see MUNICIPAL CORPORATIONS, 4-13.

Between street cars or with vehicles, see STREET RAILROADS.

Comment:

On evidence by judge, see CRIMINAL LAW, 7-9, 15.

Commerce:

Carriage of goods and passengers, see CARRIERS.

1. COMMERCE—INTERSTATE RATES—EFFECT ON STATE STATUTE OF LIMITATIONS. The interstate commerce law requiring a carrier to collect rates fixed by the tariffs without discrimination does not defeat the operation of state statutes of limitations on the ground that interposition of the statute would nullify the Federal act. *Chicago, Milwaukee & St. Paul R. Co. v. Frye & Co.* 68

Commercial Feeding Stuffs:

Sufficiency of title of act, see STATUTES, 2.

Commissions:

Of broker, see BROKERS, 2-4.

Common Carriers:

See CARRIERS.

Community Property:

Rights of survivors to claim homestead in, see HOMESTEAD, 2, 5.

In general, see HUSBAND AND WIFE.

Compensation:

Of broker, see BROKERS, 2-4.

For property taken for highway, see HIGHWAYS, 2.

By lessor for lessee's improvements, see LANDLORD AND TENANT, 1.

For services, see MASTER AND SERVANT, 1.

Complaint:

In civil action, see PLEADING, 1.

Compliance:

Failure of party to comply with concurrent obligations imposed by judgment, see JUDGMENT, 1.

Computation:

Of period of limitation, see LIMITATION OF ACTIONS, 2-4.

Conclusiveness:

Of foreign decree respecting custody of child, see DIVORCE, 5.
Of decree of final distribution of estate, see EXECUTORS AND ADMINISTRATORS, 4.

Condemnation:

Taking property for public use, see EMINENT DOMAIN.

Conditional Sales:

See SALES, 26.
Retaking possession by vendor in conditional sales contract, see TROVER AND CONVERSION.

Conditions:

On granting and refusing new trial, see NEW TRIAL, 2.
Precedent to rescission of contract, see SALES, 9.
Precedent to action for breach of contract, see SALES, 18.
Precedent to action of trover, see TROVER AND CONVERSION, 3.
In cession of jurisdiction to Federal government over property ceded for military reservation, see UNITED STATES.

Conduct:

Of party as harmless error, see APPEAL AND ERROR, 23.

Consideration:

Of contract in general, see CONTRACTS, 1, 3, 4.
Of fraudulent conveyance, see FRAUDULENT CONVEYANCES.

Constitutional Law:

Law prohibiting possession of liquors as denial of due process of law, see INTOXICATING LIQUORS, 1.
Construction of statute unconstitutional in part, see STATUTES, 1.
Subjects and titles of statutes, see STATUTES, 2-4.

1. CONSTITUTIONAL LAW (39)—JUDICIAL POWERS—SEVERITY OF LAW. The courts cannot declare a law unconstitutional because of its severity, if it meets constitutional requirements in other respects. *Swanson v. School District No. 15*..... 652

2. CONSTITUTIONAL LAW (48, 116, 134) — REGULATION OF TRADE OR BUSINESS—POLICE POWERS—EQUAL PROTECTION OF THE LAWS—DUE PROCESS. The state and Federal constitutional guarantees of due process and equal protection of the laws do not apply to laws enacted by the state legislature in the exercise of its police powers; hence Laws 1919, p. 248 *et seq.*, relating to the adulteration of concentrated feeding stuffs, enacted for the protection of dairymen and stockmen, does not violate Const., art. 1, §§ 3 and 12, or the 14th amendment

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to the Federal constitution; notwithstanding that some innocuous feed stuffs are incidentally included within the prohibition of the law. *Fisher Flouring Mills Co. v. Brown* 680

3. CONSTITUTIONAL LAW (72)—OBLIGATION OF CONTRACTS—CONTRACTS OF STATE AND SCHOOL DISTRICTS. Laws of 1919, p. 216, § 12, amending Rem. Code, § 4607, and changing the requirements as to school district bonds, did not impair the obligation of any contract as to contemplated bonds that had been previously authorized under the former law, where such bonds had not been issued or the state's bid therefor accepted prior to June 12, 1919, when the amendment took effect. *State ex rel. School District No. 301 v. Clausen*.... 37

4. CONSTITUTIONAL LAW (102)—CLASS LEGISLATION—REMEDIES—LIABILITY OF SCHOOL DISTRICTS. Laws 1917, p. 332, providing that no action shall be maintained against school districts relating to specified matters is not open to the objection of being class legislation; since it covers all school districts in the state. *Swanson v. School District No. 15* 652

5. CONSTITUTIONAL LAW (113)—EQUAL PROTECTION OF THE LAWS—CLASS LEGISLATION — CARRIERS — JITNEY BUSSES — REGULATION. An ordinance regulating jitney busses in a city does not deny the equal protection of the laws or deny to persons privileges and immunities which upon the same terms belong to other persons, in violation of the state and Federal constitutions, in that its provisions are not made applicable to street cars, taxicabs, automobiles for hire, stages running to points outside the city, and others; since the business of jitney busses differs from all these and the effect of the constitutional limitations merely is to prohibit arbitrary and unreasonable classifications, and require only that the regulations operate alike upon all those similarly affected. *State ex rel. Schafer v. Spokane* 360

Construction:

Of contract by broker, authority of, see BROKERS, 1.
Of contracts in general, see CONTRACTS, 2, 6.
Of deeds, see DEEDS, 4-6.
Of contract of sale, see SALES, 6-8.

Contracts:

See JOINT ADVENTURES.
Agreement to arbitrate, see ARBITRATION AND AWARD.
Of employment, see BROKERS.
Transportation of goods, see CARRIERS, 1-3.
For carriage of live stock, see CARRIERS, 4-6.
Impairing obligations, see CONSTITUTIONAL LAW, 3.
Operation and effect of customs or usages, see CUSTOMS AND USAGES.

Contracts—Continued.

Liquidated damages or penalties, see DAMAGES, 1, 2.
Admission of parol or extrinsic evidence, see EVIDENCE, 6-8.
Agreements within statute of frauds, see FRAUDS, STATUTE OF.
Of guaranty, see GUARANTY.
Separation agreement, see HUSBAND AND WIFE, 1-3.
Recovery for breach of, see INJUNCTION.
Insurance contracts, see INSURANCE.
Leases, see LANDLORD AND TENANT.
Limitation of actions on, see LIMITATION OF ACTIONS.
Employment, see MASTER AND SERVANT, 1.
Record of as notice, see RECORDS.
Sales of personalty, see SALES.
Implied obligation to pay for services rendered, see WORK AND LABOR.

1. CONTRACTS (4, 25)—MUTUALITY—CONSIDERATION—MUTUAL PROMISES. An agreement promising to sell ice at a certain price for one year to a certain dealer and to no other in consideration of such dealer's soliciting and delivering ice in a certain district, is entirely unilateral and unenforceable for lack of mutuality or consideration; since the dealer made no promise to solicit, deliver or buy the ice, and assumed no obligation. *Mowbray Pearson Co. v. E. H. Stanton Co.* 601

2. CONTRACTS (6)—OFFER AND ACCEPTANCE—CONSTRUCTION. In such a case, indorsing the word "accepted" upon the contract does not constitute a promise on the part of the dealer to solicit, deliver or buy the ice. *Mowbray Pearson Co. v. E. H. Stanton Co.*..... 601

3. CONTRACTS (22)—MORTGAGES (12-1)—CONSIDERATION. The withdrawal and relinquishment of conflicting claims to coal lands applied for under the land laws, is a sufficient consideration for an agreement to pay certain sums therefor, and for a mortgage on the lands after patent issued. *Weikel v. Davis* 97

4. CONTRACTS (24)—CONSIDERATION—MUTUAL PROMISES—INDEPENDENT CONSIDERATION. The carrying out of a unilateral contract to sell ice for one year to a certain dealer and no other, is not an independent consideration for an agreement extending the contract for the next year; since it could be withdrawn at any time. *Mowbray Pearson Co. v. E. H. Stanton Co.* 601

5. CONTRACTS (40, 41)—MINES AND MINERALS (3½)—PUBLIC POLICY—RESTRICTION ON CONVEYANCES. The only restriction upon the acquisition of Federal coal lands being the limitation that no one person shall obtain more than 160 acres and no association more than 320 acres, a contract for a relinquishment whereby the patentee agrees to mortgage the land acquired to secure the sum agreed upon

Contracts—Continued.

as consideration for the relinquishment is not in violation of the act or against public policy. *Weikel v. Davis* 97

6. CONTRACTS (66)—CONSTRUING INSTRUMENTS TOGETHER. A tentative agreement for the amalgamation of two banks, and a reciprocal guarantee agreement on the part of the stockholders, made and entered into at the same time, must be considered together. *Moore v. Baasch* 568

Contributory Negligence:

As defense in action for wrongful death of wife, see DEATH.
Of driver colliding with auto truck, see HIGHWAYS, 7, 8.
Of driver of horse frightened by auto, see HIGHWAYS, 10.
Of driver of auto in collision at crossing, see MUNICIPAL CORPORATIONS, 6, 9, 11.
Of person struck by auto at street crossing, see MUNICIPAL CORPORATIONS, 8, 11-13.
Of person injured by fall on sidewalk, see MUNICIPAL CORPORATIONS, 15.
Of driver of auto struck by street car at crossing, see STREET RAILROADS.

Conversion:

Wrongful conversion of personal property, see TROVER AND CONVERSION.

Conveyances:

In general, see DEEDS.
In fraud of creditors, see FRAUDULENT CONVEYANCES.
As security for debt, see MORTGAGES.
Mortgaged property, see MORTGAGES, 3-6.

Corporations:

Transfer of stock by husband to wife as in fraud of creditors, see FRAUDULENT CONVEYANCES, 1.
Remedies of receiver in avoiding conveyance in fraud of creditors, see RECEIVERS.

1. CORPORATIONS (195)—ACTIONS—VENUE—"TRANSACTING BUSINESS." Where a corporation was buying and selling land in a county and leasing the same on shares and receiving and disposing of the same and made a contract in that county, it was "transacting business" in such county, within the meaning of Rem. Code, § 206, authorizing suits to be commenced against a corporation in any county where it was transacting business. *Cohagen v. Big Bend Land Co....* 404

2. CORPORATIONS (224) — RECEIVERS — POWERS — REPRESENTATION OF CREDITORS. As the receiver of an insolvent corporation represents the creditors, he may avoid a transaction whereby the corporation

Bills and Notes—Continued.

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Of mutual benefit societies, see INSURANCE, 3-5.

Calendar:

Dropping case from calendar as termination of attorney's employment, see LIMITATION OF ACTIONS, 2.

Cancellation of Instruments:

Duress in execution of note, see BILLS AND NOTES, 5.
Setting aside fraudulent conveyances, see FRAUDULENT CONVEYANCES.

Carriers:

Regulation of interstate freight rates, see COMMERCE.
Regulation of jitney busses as denial of equal protection of laws, see CONSTITUTIONAL LAW, 5.
Limitation of action to recover freight charges, see LIMITATION OF ACTIONS, 1, 3.

1. CARRIERS (7)—CONTRACTS—TARIFFS. An interstate carrier can enter into no contract of transportation not expressly authorized in its published tariffs. *Pacific Fruit & Produce Co. v. Northern Pacific R. Co.* 481

2. CARRIERS (8-1)—OF GOODS—REFUSAL TO ACCEPT—LIABILITY. It is primarily a carrier's duty to accept a shipment and furnish suitable equipment under a requested optional service, published in its tariff, but it is not liable if its failure was due to an unprecedented shortage of cars and conditions which it could not reasonably anticipate or avoid. *Pacific Fruit & Produce Co. v. Northern Pacific R. Co.* 481

3. SAME (8-1)—REFUSAL TO ACCEPT GOODS—PLEADING—DEFENSES. In a shipper's action for damages to apples frozen in transit, the carrier's answer states a good defense, where it appears that its published tariffs provided an optional service, one at shipper's risk and the other at a higher rate at the risk of the company, which latter required refrigerator cars, that, upon plaintiff's demand for such service, the company used due diligence to obtain refrigerator cars, but from unprecedented conditions was unable to do so, whereupon plaintiff elected to accept the other service, which called for box cars, stoves, and a shipper's attendant, and signed a contract for such service in which he assumed all risks, and that the shipper's loss was due to failure to properly prepare the car and to the negligence of his agent attending the shipment. *Pacific Fruit & Produce Co. v. Northern Pacific R. Co.* 481

Carriers—Continued.

4. CARRIERS (47)—LIVE STOCK—RATES—CONTRACTS—CONSTRUCTION—RESHIPMENTS FROM CONCENTRATION POINTS. Under a tariff contract for the shipment of hogs in single-deck cars to concentration points and billed through, but to be reshipped without rebilling for a long haul in double-deck cars in the ratio of three for each two single-deck car loads, the company cannot recover on the basis of the number of single-deck cars, where, owing to underloading thereof, there were more single-deck cars than three to each two double-deck car loads; but can only recover for the service rendered, which would be the local rate to concentration points on the excess of single-deck cars. *Chicago, Milwaukee & St. Paul R. Co. v. Frye & Co.* 68

5. SAME (47)—LIVE STOCK—RATES—ABANDONED CARS AT CONCENTRATION POINTS. In the absence of a tariff provision covering the matter of freight shipped to concentration points, but billed through and reshipped without rebilling for a long haul in a less number of cars, the company can recover only the reasonable value of the services, which would be the local rate to concentration points upon cars there abandoned. *Chicago, Milwaukee & St. Paul R. Co. v. Frye & Co.* 68

6. SAME (47)—LIVE STOCK—RATES—CONTRACT—ADDITIONAL SWITCHING CHARGES. A contract naming the tariff on through shipments of stock to be delivered at a point where the company had no terminals does not entitle the company to collect, in addition, switching charges, where the shipper stood ready to accept delivery at any point in the city, and the company elected to deliver at the shipper's yards because the switching was less expensive than at other points. *Chicago, Milwaukee & St. Paul R. Co. v. Frye & Co.* 68

Certified Copies:

As evidence in criminal prosecution, see CRIMINAL LAW, 5.

Certiorari:

1. CERTIORARI (6)—WHEN LIES—ADEQUACY OF REMEDY BY APPEAL. Certiorari does not lie to review a judgment enjoining a city from the prosecution of public work, on the ground that the remedy by appeal is inadequate, where it merely appears that the time for performance of the contract will expire before the appeal can be heard and the delay would cause inconvenience to the contractor and city, since the appeal will afford a complete remedy. *State ex rel. Kent v. Superior Court* 336

2. CERTIORARI (30)—SCOPE AND EXTENT OF REVIEW—MERITS. Under Rem. Code, § 1010, limiting the questions involving the merits upon certiorari to whether there was any competent proof of the facts necessary to be found, and, if so, whether there was such a prepon-

Customs and Usages:

1. CUSTOM AND USAGE (6)—EVIDENCE (159)—PAROL EVIDENCE OF TRADE MEANING. Oral evidence is admissible that the words "bulk basis" in a contract for the sale of a car load of prunes has a technical or trade meaning, generally known and recognized by the trade; especially when all the parties are connected with the trade, as they are conclusively presumed to know the trade language. *Gile v. Tsutakawa* 366

Damages:

For injuries from trespassing animals, see ANIMALS.
In condemnation proceedings, see EMINENT DOMAIN.
Recovery for breach of contract, see INJUNCTION.
Claims against city for, see MUNICIPAL CORPORATIONS, 17, 18.
Ground for new trial, see NEW TRIAL, 1.
Breach by seller of contract for sale of goods, see SALES, 13, 16, 23-25.
For conversion, see TROVER AND CONVERSION, 4.

1. DAMAGES (35-1)—LIQUIDATED DAMAGES AND PENALTIES—PROPORTION OF SUM STIPULATED. Under a fifteen-year lease calling for rent in the total sum of $76,500, the sum of $5,000, paid on the last installments and stipulated as liquidated damages in case of forfeiture of the lease, is not so disproportionate to the amount involved as to amount to a penalty. *Smith v. Lambert Transfer Co.* 529

2. SAME (38)—LIQUIDATED DAMAGES—LIMIT OF RECOVERY. Under a lease providing for stipulated damages in the sum of $5,000 in case of forfeiture for breach of conditions, the lessor cannot recover any sum in addition on account of the nonpayment of taxes which was a special damage arising from a breach of one of the covenants of the lease. *Smith v. Lambert Transfer Co.* 529

3. DAMAGES (84, 88)—EXCESSIVE DAMAGES—INJURY TO LEG. A verdict for $5,000 for injuries to a stevedore are not excessive, where he was seriously bruised, his knee was broken and his kidneys injured and he suffered much pain in a hospital for seven weeks, it would probably be a year before he could perform his usual work, he might not be able to do heavy work, and his doctor's bills came to several hundred dollars. *Johnson v. North Coast Stevedoring Co.* 236

4. DAMAGES (98)—PLEADING—VARIANCE—GENERAL OR SPECIAL—PERSONAL INJURY. In an action for personal injuries, where the effects of the accident upon the plaintiff's eyes resulting in a diminution of vision were fully set forth in the complaint, it is competent for an expert to give his opinion that the diminution of vision was the result of a fracture of the skull, although such fracture was not specially pleaded, there being no suggestion of surprise, defendant's witnesses having examined plaintiff and being of the opinion that there was no fracture. *Reames v. Heymanson* 132

Damages—Continued.

5. DAMAGES (98)—PLEADING—GENERAL OR SPECIAL DAMAGES. In an action for personal injuries, plaintiff cannot be required to set out or specially plead the amount of damages claimed for pain and suffering already endured, and the amount that will be sustained in the future, but can recover therefor under the general allegation of damages. *Fisher v. Anacortes* 191

6. DAMAGES (108)—EVIDENCE—EXPECTANCY OF LIFE. Mortuary tables are admissible in an action for personal injuries where plaintiff had not fully recovered thirteen months after the accident and it would seem that her injuries would be permanent. *Fisher v. Anacortes* 191

Death:

Of party as ground for abatement, see ABATEMENT AND REVIVAL.
Descent of community property to heirs, see HUSBAND AND WIFE, 4, 5.
Of party before judgment, see JUDGMENT, 3.

1. DEATH (9)—RIGHT OF ACTION—DEFENSES—CONTRIBUTORY NEGLIGENCE. In an action for wrongful death, the contributory negligence of the husband, resulting in the death of the wife, is the contributory negligence of the community and hence precludes recovery for wrongful death of the wife. *Heath v. Wylie* 86

Debt:

Promise to pay debt of another, see FRAUDS, STATUTE OF, 1.
Acknowledgment of as tolling statute, see LIMITATION OF ACTIONS, 5.
Debt secured by mortgage, see MORTGAGES, 1.
Assumption of mortgage debt by purchaser, see MORTGAGES, 3, 4, 6.

Debtor and Creditor:

See FRAUDULENT CONVEYANCES.

Decedents:

Estates, see EXECUTORS AND ADMINISTRATORS.

Deceit:

See FRAUD.

Decision:

On appeal, see APPEAL AND ERROR, 28.

Declarations:

Self-serving declarations, see CRIMINAL LAW, 2.
Of agent to show authority, see PRINCIPAL AND AGENT, 4.

Deeds:

By executors or administrators, see EXECUTORS AND ADMINISTRATORS, 3.

Deeds—Continued.

1. DEEDS (15-21)—DELIVERY—DEPOSIT IN COURT. Where deeds of a husband and wife, tendered and filed in court, were, at all times pending an appeal by the adverse parties, subject to recall on abandonment of the controversy, they became ineffectual for any purpose as to the wife's interest upon her death before termination of the suit. *Gordon v. Hillman* 223

2. DEEDS (21-1, 63)—VALIDITY—MENTAL CAPACITY—EVIDENCE—SUFFICIENCY. A finding of mental capacity on the part of a woman aged eighty to execute a deed to her daughter, with whom she had made her home for years, is sustained, although relatives testified she was childish, where disinterested witnesses testified to facts showing more than ordinary mental capacity for one of her age. *Parr v. Campbell* 376

3. SAME (21-1, 63)—VALIDITY—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY. A finding that a woman eighty years of age was not unduly influenced by her daughter with whom she had resided for years, to execute a deed to her, is sustained by evidence of her sense of obligation to her daughter and repeated expressions of her intent to compensate her; it not being undue influence for a daughter to persuade or solicit her mother to make a conveyance, so long as she was not overborne or rendered incapable of acting upon her own motives. *Parr v. Campbell* 376

4. DEEDS (25-1-31)—CONSTRUCTION—GENERAL RULES. In ascertaining the intent of a deed some meaning should be given to every expression, if it can reasonably be done, not inconsistent with the general intent, and if ambiguous, the construction given by the parties may be considered. *Gold Bar v. Gold Bar Lumber Co...* 391

5. SAME (34)—PROPERTY CONVEYED. A water deed of "the right of way and pipe line or gravity system" of the grantor within the corporate limits of a city does not include service pipes outside the city limits, used by the grantor in connection with its mill; "or gravity system" being merely synonymous with right of way and pipe line within the city, especially where the parties had so construed the deed. *Gold Bar v. Gold Bar Lumber Co.* 391

6. SAME (45)—EXCEPTIONS—OPERATION AND EFFECT. In a water deed, conveying a right of way across a school section, an exception of the school section from the warranty clause does not operate to exclude things not contained within the description actually sold. *Gold Bar v. Gold Bar Lumber Co.* 391

Defamation:

See LIBEL AND SLANDER.

Defect:

Injuries from defect in sidewalk, see MUNICIPAL CORPORATIONS, 14-16.

Delivery:

Of deed, see DEEDS, 1.
Of goods sold, see SALES, 7, 8, 10.

Demand:

Of delivery of goods purchased, see SALES, 10.
As condition precedent to action for conversion, see TROVER AND CONVERSION, 3.

Depositaries:

Deposit of public funds by county treasurer, see COUNTIES.

Deposits:

Of public funds by county treasurer, see COUNTIES.
Deposit of deed as sufficient delivery, see DEEDS, 1.
Ownership of, see EMBEZZLEMENT, 2.

Deposits in Court:

Stay of judgment directing payment of fund into court, see APPEAL AND ERROR, 9, 10.
Of deeds, as delivery, see DEEDS, 1.

Descent and Distribution:

Rights as to homestead, see HOMESTEAD.
Rights of heirs in community property, see HUSBAND AND WIFE, 4, 5.

Description:

Of injury in claim filed with city, see MUNICIPAL CORPORATIONS, 17.

Designation:

Of beneficiaries in mutual benefit policy, see INSURANCE, 4, 5.

Directing Verdict:

In civil actions, see TRIAL, 6.

Disbarment:

Of attorney, see ATTORNEY AND CLIENT.

Discretion of Court:

Grant of supersedeas by supreme court, see APPEAL AND ERROR, 11, 12.
Review in civil actions, see APPEAL AND ERROR, 15-17.
Review of discretion in imposing maximum sentence, see CRIMINAL LAW, 16.
In trial of civil actions, see TRIAL, 1, 2.

Dismissal and Nonsuit:

Dismissal of appeal, for insufficient abstract, see APPEAL AND ERROR, 13.

At trial, see TRIAL, 4, 5.

Distribution:

Of estate of decedent, see EXECUTORS AND ADMINISTRATORS, 4.

Districts:

Drainage districts, see DRAINS.

Issuance of bonds by school district, see SCHOOLS AND SCHOOL DISTRICTS.

Ditches:

See DRAINS.

Division:

Of property by agreement of parties, see DIVORCE, 2.

Of profits under joint enterprise, see JOINT ADVENTURES, 3.

Divorce:

1. DIVORCE (8-2)—GROUNDS—FAILURE TO SUPPORT. Where abandonment had existed for more than a year and the husband had failed to support the wife for a length of time which indicated a settled purpose to disregard his duty, it is error to refuse the wife a divorce. *Barnhart v. Barnhart* 110

2. DIVORCE (47-1, 70)—VACATION—FRAUD—DIVISION OF PROPERTY. A decree of divorce, awarding the wife but $3,000 of the community property, arranged upon the mutual agreement of the parties, will be set aside for the fraud of the husband, where it was induced by falsely representing that the community property, admittedly worth $16,000, was of the value of only $6,000, and by dissuading the wife, who was ignorant of the facts, from seeking legal advice; since it was his duty to make full disclosures and a fair division or put her on notice that they were dealing at arm's length. *Howell v. Dunning* 591

3. DIVORCE (47-1, 70)—VACATION—FRAUD UPON COURT. A divorce, granted on a complaint filed one year previously, after condonation of all the charges, is a fraud upon the court which should be set aside, were it not for the fact of a second marriage and that innocent parties would suffer. *Howell v. Dunning* 591

4. SAME (104)—CUSTODY OF CHILD—MODIFICATION OF DECREE. Modification of a decree of divorce to change the custody of a five-year old child from its mother to the father on the ground of unfitness of the mother is properly denied where nothing was shown against her not known at the time of the decree, she had since remarried

Divorce—Continued.

and has a fit home and is financially able to provide for all its wants. *In re Groves* 112

5. DIVORCE (110-113)—FOREIGN DIVORCES—CONCLUSIVENESS—CUSTODY OF CHILD—MODIFICATION. Where a divorce was granted in another state awarding custody of a child to the mother, who acquired a domicile in this state, and the father acquiesced therein, the courts of this state may determine the custody of the child as its welfare may demand in case of changed conditions; and an ex parte modification of the original decree awarding the custody of the father is not binding upon our courts, under the "full faith and credit" clause of the Federal constitution. *In re Groves* 112

Documents:

Certified copies as evidence, see CRIMINAL LAW, 5.
As evidence in civil actions, see EVIDENCE, 5.
Production of by witness, see WITNESSES, 1-5.

Doing Business:

What is, see CORPORATIONS, 1.

Domicile:

As affecting marriage contract, see MARRIAGE.

Draft:

Conditional acceptance of draft, see BILLS AND NOTES, 1.

Drains:

1. DRAINS (13-1)—ESTABLISHMENT—COSTS AND EXPENSES. Under Rem. Code, § 4226-10, authorizing a change of boundaries of a proposed drainage district and a revision of estimated costs, the county commissioners cannot charge the costs of engineer's expense which was not incurred in connection with the plans substantially as recommended or which were incurred in a plan which was a substantial abandonment of that originally planned and petitioned for; but the district finally formed may be charged with such part of the costs as was necessarily incurred in the preparation of the district finally adopted. *Shoultes v. Quast* 510

2. SAME (13-1)—COSTS—ATTORNEYS. In the establishment of a drainage district it is proper to allow a reasonable attorney's fee for special attorneys employed whose services were beneficial to the district as finally created. *Shoultes v. Quast* 510

3. SAME (13-1)—COSTS—MODIFICATION OF PLAN. Where in the establishment of a drainage district, two ditches were more feasible than one, as originally planned, it is proper to allow the cost of ditch number two. *Shoultes v. Quast* 510

Due Process of Law:

See CONSTITUTIONAL LAW, 2.

Duress:

Affecting validity of note, see BILLS AND NOTES, 5.

Election of Remedies:

Retaking goods sold as bar to action for purchase price, see SALES, 26.

Emancipation:

Of infant, see INFANTS, 1.

Embezzlement:

Evidence of acts as part of res gestae, see CRIMINAL LAW, 2.
Of special deposit by bank officer, see CRIMINAL LAW, 2, 4, 5.
Impeachment of witness in prosecution for, see WITNESSES, 6.

1. EMBEZZLEMENT (14)—EVIDENCE—ADMISSIBILITY. In a prosecution of a bank officer for the embezzlement of a special deposit which he had collected on a draft from another bank and later obtained on a cashier's check of his bank, the state of the account between the two banks at the date of a subsequent failure is properly excluded as immaterial. *State v. Morris*..... 490

2. SAME (20)—BANKS AND BANKING (20)—DEPOSITS—OWNERSHIP. In a prosecution of a bank officer for the embezzlement of a special deposit, it is proper to instruct that upon either a general or special deposit the money becomes the property of the bank; especially in view of Rem. Code, § 2303, subd. 16, providing that any person shall be deemed an "owner" of any property who has a general or special property in it. *State v. Morris*..... 490

Eminent Domain:

Condemnation of land for county road, see HIGHWAYS, 2.

1. EMINENT DOMAIN (127)—DAMAGES—EVIDENCE—ADMISSIBILITY. In condemnation proceedings in which the sole question is the value of the property taken, evidence of damages through interference with the care of property while the road was being constructed is inadmissible when it does not appear that such interference would necessarily follow. *In re West Marginal Way, Seattle*..... 116

Employees:

See MASTER AND SERVANT.

Employment:

Contract of sale distinguished from employment, see SALES, 1.

Enactment:

Of statute, see STATUTES, 4.

Entry:

Entry and form of judgment, see JUDGMENT, 2.

Equity:

See TRUSTS.
Remedy at law as bar to relief by injunction, see INJUNCTION.
Amendment of complaint to conform to proof, see PLEADING, 1.
Suit to quiet title, see QUIETING TITLE.

1. EQUITY (38)—MAXIMS—CLEAN HANDS. A conveyance of land with notice of defendant's rights therein so that his interests were not affected is not a fraud that would defeat plaintiff's right to equitable relief. *Donahue v. Haskamp*..... 562

Establishment:

Of boundaries, see BOUNDARIES.
Of drains, see DRAINS.
Of highways, see HIGHWAYS, 1-3.
Of trusts, see TRUSTS, 2.

Estates:

Estates of deceased persons, see EXECUTORS AND ADMINISTRATORS.

Estoppel:

To assert invalidity of insurance policy, see INSURANCE, 1.
By judgment, see JUDGMENT, 4, 5.
To deny partnership, see PARTNERSHIP, 4.
To deny contract, see SALES, 5.

Eviction:

Of tenant, see LANDLORD AND TENANT, 2.

Evidence:

Of trespass to sustain right to treble damages, see ANIMALS.
Review of rulings as dependent on presentation of objection or exception in lower court, see APPEAL AND ERROR, 5-7.
Review on appeal or writ of error, see APPEAL AND ERROR, 18.
Prejudice from error on appeal, see APPEAL AND ERROR, 25, 26.
In action on bill or note, see BILLS AND NOTES, 2, 4, 5.
To establish boundaries, see BOUNDARIES, 2, 3.
In criminal prosecutions, see CRIMINAL LAW, 2-5.
Comment on by judge, see CRIMINAL LAW, 7-9, 15.
Customs or usage, see CUSTOMS AND USAGES.
Of damages, see DAMAGES, 6.
Of mental capacity to execute deed, see DEEDS, 2.
Of undue influence to execute deed, see DEEDS, 3.

Evidence—Continued.

In prosecution for embezzlement, see EMBEZZLEMENT, 1.
In condemnation proceedings, see EMINENT DOMAIN.
In prosecution for obtaining money by false pretenses, see FALSE PRETENSES, 2, 3.
To set aside fraudulent conveyance, see FRAUDULENT CONVEYANCES.
To sustain conviction of conducting gambling game as owner or manager, see GAMING.
Contributory negligence of driver of automobile colliding with auto truck, see HIGHWAYS, 8.
For injunction, see INJUNCTION.
On insurance policies, see INSURANCE, 1, 2.
Burden of proof as to exception from class, see INTOXICATING LIQUORS, 3.
To sustain conviction of illegal possession of liquors, see INTOXICATING LIQUORS, 4.
For libel and slander, see LIBEL AND SLANDER.
Of marriage, see MARRIAGE.
For injuries to servant, see MASTER AND SERVANT, 5.
For injuries in streets, see MUNICIPAL CORPORATIONS, 5, 6, 8-11.
Notice to municipality of defect or obstruction in street, see MUNICIPAL CORPORATIONS, 16.
Negligence of railroad company in allowing spread of fire on right of way, see NEGLIGENCE, 2.
Verdict or findings contrary to evidence, see NEW TRIAL, 1.
Existence of agency, see PRINCIPAL AND AGENT, 1.
Authority of agent, see PRINCIPAL AND AGENT, 2-4.
To impeach government survey and meanders as boundary lines, see PUBLIC LANDS, 2, 3.
Liability of party under contract of sale, see SALES, 2.
Of warranty, see SALES, 12.
For breach of contract of sale, see SALES, 16, 21, 22, 24.
To show impairment of security warranting retaking possession by conditional sales vendor, see SALES, 26.
On motion for nonsuit, see TRIAL, 4, 5.
To establish trust, see TRUSTS, 2.
In action for services, see WORK AND LABOR, 2, 4.

1. EVIDENCE (24)—PRESUMPTIONS—MAILING AND DELIVERY OF LETTER. There is a legal presumption that a letter properly addressed and mailed reached the party to whom it was addressed. *Kubey v. Travelers Protective Association*..... 453

2. EVIDENCE (76)—BEST AND SECONDARY—LOSS OF PRIMARY EVIDENCE. Upon proof that a written instrument agreeing to assume a mortgage had been executed and that it was lost, oral proof of its contents is admissible. *First State Bank of Binford v. Arneson*..... 346

Evidence—Continued.

3. EVIDENCE (79)—BEST AND SECONDARY EVIDENCE—PRELIMINARY SEARCH. It is error to admit secondary evidence of the contents of a writing where there was no proof of any search or effort to find and produce the instrument. *Cole v. Peterson*..... 671

4. EVIDENCE (104)—HEARSAY—ADMISSIBILITY. In an action to reform and foreclose a mortgage, alleged to have fixed the due date by mistake, the positive evidence of the persons present as to what occurred is not inadmissible as hearsay. *Naylor v. Lovell*.... 409

5. EVIDENCE (135, 135-1) — DOCUMENTARY EVIDENCE — PRODUCTION — PAPERS SUBJECT TO PRODUCTION. It is not error to admit in evidence papers and documents which respondent had the right, upon demand, to have produced by the appellant, regardless of whether or not they were wrongfully taken or obtained. *Johnson v. Pearson* 147

6. EVIDENCE (150, 160)—PAROL EVIDENCE TO VARY WRITING—LIABILITY OF SURETY ON NOTE—EXTENT. As between the makers of a joint and several note, oral evidence is admissible to show that one of the parties was in fact a surety, and the other primarily liable and bound to reimburse the surety paying the note. *Holland v. Tjosevig* 142

7. EVIDENCE (167)—PAROL EVIDENCE—FRAUD. In an action to rescind a sale on the ground of fraud, evidence of false representations is admissible, notwithstanding the contract recited that no representation was made other than those contained in the writing. *Wells v. Walker* 332

8. EVIDENCE (169)—PAROL EVIDENCE TO VARY WRITING—COMPLETENESS OF WRITING. A written offer to manufacture for defendant's shop special design lighting fixtures as per plans submitted, which plaintiff's complaint showed were unusual and for defendant's special use, is so incomplete as to admit proof of a special warranty of fitness and efficiency. *Gleason Company v. Carman*..... 536

Exceptions:

Necessity for exceptions for purpose of review, see APPEAL AND ERROR, 4-8.

In deeds, see DEEDS, 6.

Excessive Damages:

See DAMAGES, 3.

Exchange of Property:

Release of party from mutual obligation to reconvey lands, imposed by judgment, see JUDGMENT, 1.

Excusable Homicide:

See HOMICIDE, 2.

Execution:

Of trusts, see TRUSTS, 1.

Executors and Administrators:

Survival of actions by or against descendants, see ABATEMENT AND REVIVAL.

Homestead rights of survivor, see HOMESTEAD.

1. EXECUTORS AND ADMINISTRATORS (72, 73)—CLAIMS—PRESENTATION—NECESSITY—PENDING SUIT. Where, pending appeal, the judgment debtor died and the administratrix was substituted, judgment of affirmance was against the administratrix in her representative capacity, and the claim need not be presented within one year; in view of Rem. Code, § 1483, providing that the effect of judgment against any executor shall be to establish the claim in the same manner as if allowed by the executor. *Wynne v. Harvey*..... 1

2. SAME (73). Rem. Code, § 1484, requiring claims to be presented on judgments on which execution has not issued applies only to judgments rendered against the deceased in his lifetime, and not to a judgment of affirmance against the administratrix after she was substituted as appellant. *Wynne v. Harvey*..... 1

3. EXECUTORS AND ADMINISTRATORS (117, 120)—SALE OF REAL PROPERTY—PETITION—NOTICE. The court cannot order an administrator to execute a deed of community property in compliance with a judgment without any administrator's petition or notice to minor heirs, and the deed executed by him individually and as administrator is ineffectual to pass title to one-half of the property, under Rem. Code, §§ 1498, 1499, 1502, and 1692. *Gordon v. Hillman*..... 223

4. EXECUTORS AND ADMINISTRATORS (169)—DECREE—CONCLUSIVENESS—WIDOW'S IGNORANCE OF RIGHTS. Under Laws of 1917, p. 689, § 163, providing that a decree of final distribution shall be final and conclusive as to all the world, a widow is not entitled to have a decree set aside to enable her to make a claim for a homestead, on the ground that she was ignorant of English and of her rights, in the absence of a showing of fraud or grounds for the vacation of a judgment as required by Rem. Code, §§ 464-473. *In re Nilson's Estate* 127

Exemptions:

From taxation, see TAXATION.

Exhibits:

Taking to jury room, see CRIMINAL LAW, 13, 14.

Expenses:

In establishing drainage district, see DRAINS.

Expert Testimony:

Reception of at trial of civil action, see TRIAL, 2.

False Pretenses:

Conviction of attempt to commit larceny by false pretenses, see INDICTMENT AND INFORMATION.

1. FALSE PRETENSES (4)—DEFENSES—ATTEMPT UNSUCCESSFUL. A prosecution for attempted larceny by false pretenses in a telephone order for goods does not fail because the attempt was unsuccessful. *State v. Peterson* 25

2. SAME (13)—EVIDENCE—ADMISSIBILITY. In a prosecution for attempted larceny by false pretenses in a telephone order for goods, evidence of the telephone conversation is admissible as part of the transaction, regardless of the fact that its probative effect depended upon the evidence to connect the accused therewith. *State v. Peterson* 25

3. FALSE PRETENSES (16)—EVIDENCE—SUFFICIENCY. In a prosecution for attempted larceny by false pretenses in a telephone order for goods, accused's connection with the person telephoning is sufficiently shown by her attempt to receive the goods at the appointed place, together with her subsequent explanations and behavior. *State v. Peterson* 25

False Representations:

As ground for rescission of sale of personalty, see SALES, 9.
As defense in action for price of goods, see SALES, 15.

Fees:

Attorney's fees in establishing drainage district, see DRAINS, 2.

Filing:

Claim against decedent's estate, see EXECUTORS AND ADMINISTRATORS, 1, 2.

Final Judgment:

See ABATEMENT AND REVIVAL, 1.
Review of appealable orders, see APPEAL AND ERROR, 1.

Findings:

Review as dependent on exception in lower court, see APPEAL AND ERROR, 5, 7.
Review on appeal or writ of error, see APPEAL AND ERROR, 19-22.

Fires:

Care required to prevent spread of fire, see NEGLIGENCE.

Floods:

As cause of defective sidewalk causing injury, see MUNICIPAL CORPORATIONS, 14.

Flowage:

Injuries by flowage of water, see WATERS AND WATER COURSES.

Food:

Contracts in violation of Federal food control act, see SALES, 1.

Forgery:

Payment of forged paper by bank, see BANKS AND BANKING, 1-3.

Form:

Of judgment, see JUDGMENT, 2.

Former Adjudication:

See JUDGMENT, 4, 5.

Fraud:

See FALSE PRETENSES.
Payment of forged paper by bank, see BANKS AND BANKING, 1-3.
As affecting validity of negotiable instruments, see BILLS AND NOTES, 5.
Vacation of decree for fraud, see DIVORCE, 2, 3.
As defeating right to equitable relief, see EQUITY.
Parol evidence to show fraud, see EVIDENCE, 7.
Of husband in property settlement, see HUSBAND AND WIFE, 1-3.
Conveyances in fraud of creditors of corporations, see RECEIVERS.
As ground for rescission of sale of personalty, see SALES, 9.
As defense in action for price of goods, see SALES, 15.

1. FRAUD (4)—MISREPRESENTATIONS—MATTERS OF FACT OR OPINION. In an action for the fraud of a real estate agent in pointing out the wrong land to a prospective purchaser, the agent's statements that he was satisfied that it was the land in question were not, as a matter of law, mere expressions of opinion, where the agent claimed to have such a description and knowledge of the land as to enable him to identify it, although he had never before seen it. *Walker v. Callendar* 516

Frauds, Statute of:

1. FRAUDS, STATUTE OF (4) — ORIGINAL UNDERTAKING — ACTIONS — PARTIES PLAINTIFF. Where one promises, upon a valuable consideration, to pay the debt of another to a third person, the latter may maintain an action thereon in his own name. *Moore v. Baasch* 568

Frauds, Statute of—Continued.

2. FRAUDS, STATUTE OF (9)—REAL ESTATE—CREATION OF ESTATE—ORAL OPTIONS. Where the time for exercising a written option to purchase land had expired and the vendors, after several extensions, refused to further extend the time, any oral option or offer to sell would be void under the statute of frauds; and furthermore was not accepted in a reasonable time, where the parties had by the writing limited the time to five months, and nine months additional expired after refusal to grant the written extension. *Stewart v. Cadeau* 292

Fraudulent Conveyances:

By insolvent corporation, see CORPORATIONS, 2.
Remedies of receiver in receivership proceedings, see RECEIVERS.

1. FRAUDULENT CONVEYANCES (93)—TRANSACTIONS BETWEEN HUSBAND AND WIFE—EVIDENCE—SUFFICIENCY. The transfer by a husband to a wife of corporate stock in pursuance of a prenuptial agreement is supported by a sufficient consideration and will not be held fraudulent as to community property creditors where there were no facts or circumstances to overcome the positive oral evidence as to the *bona fides*. *Burgess v. Conforth* 150

2. SAME (93). A husband and wife's mortgage of an automobile to secure an indebtedness due from the husband, executed prior to recovery of judgment against husband and wife, is supported by a sufficient consideration, and is not fraudulent as to the judgment creditors, where there were no facts or circumstances to overcome positive oral evidence as to the *bona fides*. *Burgess v. Conforth* 150

Freight:

Regulation by interstate commerce law of rates and charges, see COMMERCE.

Freight Tariffs:

Limitation of action to recover charges by carrier, see LIMITATION OF ACTIONS, 1, 3.

Funds:

Deposit of public funds by county treasurer, see COUNTIES.

Gambling:

Conducting gambling game as owner or manager, see GAMING.

Gaming:

Evidence of other offenses, see CRIMINAL LAW, 3.

1. GAMING (17)—EVIDENCE—SUFFICIENCY. A conviction of conducting a gambling game as owner or manager is sustained by evidence that accused was one of the owners of the premises and furniture, and was present and participated in the game. *State v. Kaukos* 20

Good Faith:

Of purchaser, see BILLS AND NOTES, 2.

Guaranty:

See PRINCIPAL AND SURETY.

Bank examiner as real party in interest in action on guaranty agreement by stockholders, see PARTIES.

1. GUARANTY (9)—CONSTRUCTION—SCOPE OF CONTRACT—BENEFICIARIES. Where bank directors and stockholders agreed to the amalgamation of two banks, the stockholders at the time entering into a reciprocal guaranty of the paper held, the new organization was the direct beneficiary of the guaranty agreement, notwithstanding a resultant benefit to the stockholders; in view of provisions in the two contracts, considered together, whereby the paper guaranteed was to be taken over and collected by the new bank for its own benefit, and funds collected under the guaranty were to be paid to it. *Moore v. Baasch* 568

2. GUARANTY (9)—BANKS AND BANKING (7)—ASSETS ON INSOLVENCY. Where a stockholders' reciprocal agreement guaranteeing the paper taken over by an amalgamated bank was accepted and acted upon, it cannot be rescinded by the stockholders without the consent of the bank. *Moore v. Baasch* 568

Harmless Error:

In civil actions, see APPEAL AND ERROR, 23-27.

In criminal prosecutions, see CRIMINAL LAW, 15, 17, 18; HOMICIDE, 3, 4.

Head of Family:

Within meaning of homestead law, see HOMESTEAD, 1, 2.

Hearsay:

In civil actions, see EVIDENCE, 4.

Heirs:

Rights of in community property, see HUSBAND AND WIFE, 4, 5.

Highways:

Appropriation of land for highways, see EMINENT DOMAIN.

Defects or obstructions in city streets, see MUNICIPAL CORPORATIONS, 14-16.

Maintenance of overhead crossings and liability for defects, see RAILROADS.

1. HIGHWAYS (7)—ESTABLISHMENT—PRESCRIPTION — DEFECTIVE PROCEEDINGS. Title to a county road was acquired by prescription where the road was ordered and, without being purchased or condemned,

Highways—Continued.

was used by the public for thirty years. *In re West Marginal Way, Seattle* 116

2. SAME (3, 6-8). Where title to a sixty-foot county road, ordered but not condemned, was acquired by prescription, the use of a narrow roadway winding around stumps and buildings was not an abandonment of the unused portions; and upon condemnation to increase the width to one hundred feet, a property owner is entitled to compensation only for the additional forty feet, notwithstanding the winding way used touched points on the outer line of the additional strip. *In re West Marginal Way, Seattle*.... 116

3. SAME (6-8)—EXTENT OF HIGHWAY—WIDTH. Where, at the time a county road was ordered, the law required its width to be sixty feet, title acquired by prescriptive use extends to the full width and is not limited to the ten to fifteen feet actually used by the public. *In re West Marginal Way, Seattle*..... 116

4. HIGHWAYS (39)—LOCAL ASSESSMENTS—BENEFITS—APPORTIONMENT —STATUTES—CONSTRUCTION. The provision in Rem. Code, § 5339, as amended by Laws of 1917, p. 242, § 5, that one-half of the benefits of road improvements shall be assessed against the county and one-fourth against the road district or township is not affected by the fact that § 5761, providing for payments in installments, was amended by Laws of 1919, p. 251, § 1, without reference to its prior amendment in 1917; since the amendment in 1919 merely added an exception as to the time for payment of assessments of $25 or less, in nowise altering the method of ascertaining the benefits. *State ex rel. McMillan v. Hills*..... 175

5. SAME. The amendment of Rem. Code, § 5761, by Laws of 1919, p. 230, § 1, which provides for payment in installments of the tax levied upon the "property assessed" for county road improvements, applies to the proportion to be paid by counties and road districts as well as to assessments on private property; but, in view of the whole act, the language may be construed as mandatory to grant the maximum period on installments apportioned to individuals, and discretionary as to the maximum time for payment of benefits apportioned to the county and road districts. *State ex rel. McMillan v. Hills* 175

6. HIGHWAYS (52) — AUTOMOBILES — NEGLIGENT USE — VIOLATION OF STATUTES. The violation of Laws 1917, p. 636, § 15, requiring a red light visible at least two hundred feet to be attached to the rear of a motor vehicle, is of itself negligence. *Ebling v. Nielsen*..... 355

7. SAME (52) — AUTOMOBILES — NEGLIGENCE — VIOLATION OF TRAFFIC LAWS. Negligence *per se* in the violation of traffic laws does not preclude the defense of contributory negligence. *Ebling v. Nielsen* 355

Highways—Continued.

8. SAME (52, 58) — CONTRIBUTORY NEGLIGENCE — EVIDENCE — SUFFICIENCY. One driving an automobile over a straight road on a dark and rainy night, at a speed of twenty-five miles an hour, who collided with an auto-truck parked at the margin of the road with an insufficient red light, was guilty of contributory negligence, as a matter of law, where he did not apply the foot brake until twenty-five feet from the truck, or the emergency brake until within ten feet, and his car skidded into the truck although the wheels were locked. *Ebling v. Nielsen* 355

9. HIGHWAYS (55, 58) — USE FOR TRAVEL — FRIGHTENED ANIMALS — QUESTION FOR JURY. Whether there was compliance with Rem. Code, § 5562-27, as to the duty of an automobile driver on approaching frightened animals, is a question for the jury, where there was evidence that the auto approached a frightened horse upon a dangerous approach to a bridge, at a high rate of speed and making a great noise, causing the horse to plunge off the embankment. *Ross v. Rose* 273

10. SAME (58)—CONTRIBUTORY NEGLIGENCE. Whether a horse that became frightened at an automobile was known by defendant to be unsafe to drive, is a question for the jury, where it appeared that he had frequently driven it in automobile traffic and had passed automobiles safely in the same place, although once some months before it had turned around with him. *Ross v. Rose*..... 273

11. SAME (59)—INSTRUCTIONS. In an action for injuries sustained through the frightening of plaintiffs' horse in the negligent driving of an automobile at great speed making a great noise, it is proper to refuse to instruct that plaintiffs' failure to signal defendant, as provided in Rem. Code, § 5562-27, was contributory negligence precluding a recovery, since the signal is called for only when a full stop is required, and the statute made it the positive duty of the defendant to exercise precaution to prevent frightening the horse. *Ross v. Rose* 273

Homestead:

1. HOMESTEAD (4)—HEAD OF FAMILY — MINOR SON—"MAINTAINED." A widow is not entitled to claim a homestead, as having residing with her a minor son under her care and "maintenance," within Rem. Code, § 553, where the son had been emancipated by his marriage and was himself the head of a family and was contributing to the support of the combined family rather than being maintained by his mother. *Morgan v. Cunningham*..... 105

2. HOMESTEAD (4, 21, 22)—HEAD OF FAMILY—RIGHTS OF SURVIVING SPOUSE. Neither the surviving husband nor wife who was not the "head of a family" within the meaning of Rem. Code, § 553, could

Homestead—Continued.

acquire a homestead in community property when homestead rights had not been perfected prior to the death of the other spouse. *In re Bloor's Estate* 554

3. HOMESTEAD (7) — SELECTION — NECESSITY. Under Rem. Code, §§ 528-561, no right of homestead existed in any specific property until it was selected and the selection recorded; and prior residence upon the land lends no support to the claim of homestead rights. *In re Bloor's Estate* 554

4. HOMESTEAD (7, 22) — SELECTION—SURVIVORS—STATUTES—REPEAL. Rem. Code, §§ 1465 and 1468, contemplating the vesting of title to the homestead in the widow and minor children on the death of the husband was in that respect repealed by §§ 528-561, requiring the selection of specific property. *In re Bloor's Estate*..... 554

5. HOMESTEAD (22, 23)—RIGHTS OF SURVIVING WIFE AND HEIRS—STATUTES—RETROACTIVE EFFECT—VESTED RIGHTS. The probate code, Laws 1917, p. 670, § 103, enlarging the homestead rights of each spouse upon the death of the other, does not entitle a surviving wife to a homestead in the undivided half of community property that had not been selected as a homestead in the husband's lifetime, and had become vested in his heirs by descent prior to the taking effect of the act of 1917; since it would impair vested rights. *In re Bloor's Estate* 554

Homicide:

1. HOMICIDE (33)—INDICTMENT AND INFORMATION (103)—DEGREES OF HOMICIDE. An information charging murder in the first degree includes and warrants conviction of the lesser degree of manslaughter. *State v. Sowders* 10

2. HOMICIDE (114)—INSTRUCTIONS—ACCIDENT OR MISFORTUNE. An instruction that a homicide is excusable when committed by accident or misfortune in doing a lawful act without unlawful intent and that an accident is an event without occurrence of the will or expectation, is clear and sufficient on the subject. *State v. Sowders* 10

3. HOMICIDE (131)—APPEAL—HARMLESS ERROR—INSTRUCTIONS. Failure to mention accident or misfortune in instructions as to justification for murder in the second degree is not fatal to a conviction of manslaughter. *State v. Sowders* 10

4. HOMICIDE (131)—APPEAL—HARMLESS ERROR—INSTRUCTIONS. Upon a conviction of manslaughter, a misdirection in defining murder in the first degree is harmless error. *State v. Sowders* 10

Husband and Wife:

Actions for wrongful death of husband or wife, see DEATH.

Husband and Wife—Continued.

Conveyances between as in fraud of creditors, see FRAUDULENT CONVEYANCES, 1.

Rights of survivor in homestead, see HOMESTEAD.

Marriage and annulment thereof, see MARRIAGE.

1. HUSBAND AND WIFE (37, 103-1)—ACTS IN FRAUD OF WIFE—SEPARATION AGREEMENTS. Where a property settlement was induced by the husband's false representations and his concealment of a substantial amount of personal property belonging to the community, which the wife could not have discovered by diligent effort, she may recover her damages, notwithstanding the agreement provided that she waived all rights and claims she might have by reason of any false representations inducing her to enter into it. *Normile v. Denison* 205

2. SAME (37, 104) — FRAUD — ACTION ON SEPARATION AGREEMENT — PLEADING. Where it appeared from her complaint that a wife was induced to enter into a final property settlement by false representations and concealment, a defense that she knew she had been defrauded by a prior partial settlement and in the final agreement compromised the fraud must be raised by answer, where there was nothing in the complaint to justify assumption of such fact. *Normile v. Denison* 205

3. SAME (37, 104)—DEFENSES. In an action by a widow to recover a half interest in community property, concealed from her by her late husband upon the making of a property settlement between them, in which she offers to account for all community property received by her in the settlement, the defense that the parties cannot be put in *statu quo* is unavailing, as the court can do equity between the parties. *Normile v. Denison* 205

4. HUSBAND AND WIFE (98)—COMMUNITY PROPERTY—RIGHTS OF HEIRS—JUDGMENT AGAINST HUSBAND AND WIFE—EFFECT. A judgment rescinding a trade and imposing reciprocal and concurrent obligations of reconveyance, with an alternative of a future money judgment, does not prevent community property from descending to the heirs upon death of one of the parties before performance. *Gordon v. Hillman* 223

5. HUSBAND AND WIFE (98) — COMMUNITY PROPERTY — DESCENT TO HEIRS. On the death of a wife, intestate, the title to one-half the community real property vested immediately in her two minor sons. *Gordon v. Hillman* 223

Impairment:

Of security by vendee in conditional sales contract, see SALES, 26.

Impeachment:

Of witnesses, see WITNESSES, 6.

Implied Contracts:

See LIMITATION OF ACTIONS, 1, 4; WORK AND LABOR.

Implied Repeal:

Of statutes, see STATUTES, 5.

Implied Warranty:

On sale of goods, see SALES, 13, 25.

Imprisonment:

Of minors separate from adults, see INFANTS, 2.

Improvements:

Assessment of benefits from road improvements, see HIGHWAYS, 4, 5.
On premises demised, see LANDLORD AND TENANT, 1.

Incumbrances:

See MORTGAGES.

Indictment and Information:

Conviction of lesser degree charged, see HOMICIDE, 1.

1. INDICTMENT AND INFORMATION (104) — CONVICTION OF ATTEMPT. Under Rem. Code, § 2263, one informed against for larceny by false pretenses may be convicted of an attempt to commit the offense. *State v. Peterson* 25

Indorsement:

Of bill or note, see BILLS AND NOTES, 3.
Of checks by agent, see PRINCIPAL AND AGENT, 2.

Industrial Insurance Act:

See MASTER AND SERVANT, 2, 3.

Infants:

Custody of children on divorce, see DIVORCE, 4, 5.
Application of workmen's compensation act to minor employees, see MASTER AND SERVANT, 2.

1. INFANTS (1)—EMANCIPATION—MARRIAGE. A minor son is emancipated by marriage with the consent of his parents, although it does not remove civil disabilities. *Morgan v. Cunningham*..... 105

2. INFANTS (16)—JUVENILE OFFENDERS—PUNISHMENT—STATUTES. A boy under sixteen years of age may be committed to the state penitentiary, notwithstanding Rem. Code, § 1982-12, providing that such a child shall not be confined in any building with adult convicts. *State v. Sowders* 10

Information:

Criminal accusation, see INDICTMENT AND INFORMATION.

Injunction:

Certiorari to review judgment enjoining prosecution of public work, see CERTIORARI, 1.

1. INJUNCTION (6, 7)—INADEQUACY OF REMEDY AT LAW—RECOVERY OF DAMAGES. The inadequacy of the remedy at law for breach of a contract to sell cascara bark which could have been purchased elsewhere at a small advance, is not sufficiently shown where the only evidence of defendant's insolvency was the inference to be drawn from the fact that he was the head of a family, and that he owned a home worth $300, an automobile worth $400, and one ton of cascara bark. *Gardiner v. Gyorog* 660

Insolvency:

Preferences by insolvent corporation, see CORPORATIONS, 2.

As ground for injunction, see INJUNCTION.

Bank examiner as real party in interest in action on guaranty agreement by stockholders, see PARTIES.

Receivers of insolvent corporation, see RECEIVERS.

Inspection:

Sampling whiskey by jury, see CRIMINAL LAW, 6, 13.

Sales of goods subject to inspection, see SALES, 11.

Of goods sold, see SALES, 12, 13.

Instructions:

Review as dependent on exception in lower court, see APPEAL AND ERROR, 4, 8.

Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 27.

In criminal prosecutions, see CRIMINAL LAW, 10-12; HOMICIDE, 2-4.

In civil actions, see TRIAL, 7.

Insurance:

1. INSURANCE (105-116)—WAIVER AND ESTOPPEL—CONDITIONS—ENGAGING IN MILITARY SERVICE—PERMISSION—EVIDENCE—SUFFICIENCY. A clause in a life insurance policy providing that the company would not be liable if death ensued while insured was engaged in the military service of the United States unless the company's permission had been obtained, is not waived by a letter directing the insured or the beneficiary to take up the matter with the local agent, where the local agent merely stated that he would send the policy and letter back to the company and get its consent and made no endorsement on the policy and no attempt to modify it, and death ensued before permission was granted and before insured had

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agreed to pay extra premium, as required by the company before granting the permission. *Sandstedt v. American Central Life Ins. Co.* 338

2. INSURANCE (188)—ACCIDENT INSURANCE—NOTICE TO INSURER—EVIDENCE—QUESTION FOR JURY. Whether an insurance company received notice of an accident is a question for the jury, where the evidence of the insured's son that he made out and mailed notice of the claim was corroborated by his sister who was present, notwithstanding he admitted having written to the company only on two occasions, which his letters show to have been at a different time. *Kubey v. Travelers Protective Association*..... 453

3. SAME (196)—BY-LAWS—RULES AND CUSTOMS—EFFECT. A mere custom or office rule of a mutual benefit insurance company not to issue certificates in which alternate or secondary beneficiaries are named, not brought home to the member's knowledge, are not binding upon him, if not incorporated in or made part of its printed matter distributed to members. *Supreme Assembly of United Artisans v. Johnson* 247

4. INSURANCE (207)—MUTUAL BENEFIT INSURANCE—BENEFICIARIES—DESIGNATION—BY-LAWS—EFFECT. Where the by-laws of a mutual benefit insurance company gave the insured the right to select his beneficiary within certain restrictions, and he did so in his application by naming his wife, and his two children and in the event of her death, there beng no stipulation against alternate or secondary beneficiaries, the subsequent issuance of the certificate containing the name of the wife only was not a rejection of the children as beneficiaries upon the death of the wife; and in such case, upon the member's remarriage, the children are the beneficiaries to the exclusion of the second wife, notwithstanding a subsequent by-law provided that, in the event of the death of the beneficiary before the death of the member, if no other designation has been made, the benefits shall be paid to the "widow." *Supreme Assembly of United Artisans v. Johnson* 247

5. SAME (207). A by-law of a mutual benefit association which provided that, in the event of the death of the beneficiary before the death of the member, the benefits shall be paid to the widow, "if no other designation has been made," refers to a designation by the member in his lifetime, either before or after the death of the beneficiary named in the certificate. *Supreme Assembly of United Artisans v. Johnson* 247

Intent:

Evidence of other offenses to show intent, see CRIMINAL LAW, 4.

Interest:

On funds of port district, see COUNTIES.

Interrogatories:

Right to review of error in submission of to jury without right of argument as dependent on request therefor, see APPEAL AND ERROR, 2.

Right of argument on, see TRIAL, 3.

Interstate Commerce:

See COMMERCE.

Intoxicating Liquors:

Sampling and testing of whiskey by jury, see CRIMINAL LAW, 6, 13.

Sampling liquor exhibits by jury in jury room as misconduct, see CRIMINAL LAW, 13, 14.

1. INTOXICATING LIQUORS (6)—UNLAWFUL POSSESSION—STATUTES—CONSTITUTIONALITY. Laws 1917, p. 60, § 17h, making it unlawful for any person except clergymen or priests to have possession of any intoxicating liquor other than alcohol, is not unconstitutional as abridging the privileges or immunities of citizens or as depriving any person of life, liberty or property without due process of law. *State v. Giaudrone* 397

2. INTOXICATING LIQUORS (30)—UNLAWFUL POSSESSION—STATUTES—CONSTRUCTION. Laws 1917, p. 60, § 17h, amendatory of the prohibition act (Rem. Code, § 6262-1 *et seq.*), providing that it shall be unlawful for any person except clergymen or priests to have possession of any intoxicating liquor other than alcohol, is inconsistent with and impliedly repeals the provisions of the original act making it lawful to give away intoxicating liquors in a private residence to be drunk on the premises. *State v. Giaudrone* 397

3. INTOXICATING LIQUORS (48) — ILLEGAL POSSESSION — BURDEN OF PROOF. In a prosecution for illegal possession of intoxicating liquors, the burden is upon the defendant to show that he was not a clergyman, priest or rabbi, excepted by Laws 1917, p. 61, § 12. *State v. Franich* 17

4. SAME (50)—EVIDENCE—SUFFICIENCY. A conviction of the illegal possession of intoxicating liquor is sustained by proof that, during a search of the premises, accused threw a broken demijohn from the window, and intoxicating liquor was found dripping from it and on the floor and wall of the room. *State v. Franich*..... 17

Jitney Busses:

Regulation of as denial of equal protection of laws, see CONSTITUTIONAL LAW, 5.

Regulation of by city, see MUNICIPAL CORPORATIONS, 2, 3.

Joint Adventures:

1. JOINT ADVENTURES—PROFIT SHARING IN PURCHASE OF LANDS. A joint adventure, and not a partnership, is constituted by an agreement whereby defendant employed plaintiff as agent in purchasing timber land, the plaintiff to receive a certain per cent of the net profits and to share the same proportion of the losses, where there was no mutual agency and the control of the lands purchased was entirely in the defendant. *Donahue v. Haskamp* 562

2. SAME—RIGHTS OF PARTIES—TERMINATION. In such a case, where, owing to the war, it was impossible to dispose of the lands at a profit, it would be unconscionable to hold the property indefinitely; and the purchases having been made and the capital invested, plaintiff should be given one year to dispose of the property and account for the proceeds in accordance with the contract, at the end of which time it will be deemed performed and the undertaking terminated. *Donahue v. Haskamp* 562

3. JOINT ADVENTURES—MUTUAL LIABILITIES—DIVISION OF PROFITS—JUDGMENT. In an action on a contract between two promoters of a corporation whereby each was entitled to one-half of the net profits of the enterprise, plaintiff is not entitled to recover a money judgment on proof that defendant had received a certain amount of stock in the company, which was worth less than par, in the absence of any proof of the value of the stock; and the judgment should be for fifty per cent of the net amount of stock received as admitted. *Smith v. Brown* 187

Judges:

Conduct of judge in criminal trial, see CRIMINAL LAW, 7-9, 15.

Judgment:

Review in general, see APPEAL AND ERROR.
Appealability as final, see APPEAL AND ERROR, 1.
In action to establish boundary lines, see BOUNDARIES, 5.
Vacation of in criminal action, see CRIMINAL LAW, 1.
Vacation or modification of divorce decree, see DIVORCE, 2-5.
Presentment of claims on judgments, see EXECUTORS AND ADMINISTRATORS, 1, 2.
For distribution of estate of decedent, see EXECUTORS AND ADMINISTRATORS, 4.
Against husband and wife as affecting right of heirs, see HUSBAND AND WIFE, 4.
Division of profits under joint enterprise, see JOINT ADVENTURES, 3.
Payment of judgment by trustee, see TRUSTS, 1.

1. JUDGMENT—COMPLIANCE—CONCURRENT OBLIGATIONS. Where a judgment to rescind a trade imposed upon the parties reciprocal and con-

Judgment—Continued.

current obligations as to reconveyance within a specified time, the failure of one party to reconvey relieves the other. *Gordon v. Hillman* 223

2. JUDGMENT (13)—ENTRY AND FORM—SUFFICIENCY. A judgment ordering defendant to pay a certain sum with costs is not error, as it is to be tested by its substance rather than its form. *Hull v. Crescent Manufacturing Co.* 129

3. JUDGMENT (111-1) — VACATION — DEATH OF PARTY. Under Rem. Code, § 464, subd. 6, a judgment may be vacated by a direct attack in the court where the judgment was rendered, on the ground of death of one of the parties before the judgment. *Gordon v. Hillman* 223

4. JUDGMENT (209) — CONCLUSIVENESS—PERSONS CONCLUDED—NOTICE TO DEFEND—NONLIABLE. Judgment for the United States against a drawee bank for the amount of government funds embezzled by a public disbursing officer, by means of checks to fictitious payees and forged indorsements, wrongfully paid by the bank, does not foreclose the defense of another bank which passed the checks through the clearing house, on their deposit to a checking account, although the defense of the action was tendered to it, where the defense was declined by the passing bank and it was under no legal obligation in the premises to make good the loss of the drawee bank. *National Bank of Commerce of Seattle v. Seattle National Bank*..... 312

5. JUDGMENT (227, 229)—CONCLUSIVENESS — BAR — MATTERS NOT IN ISSUE OR WHICH COULD NOT HAVE BEEN ADJUDICATED. A judgment on the merits to the effect that a school district was legally authorized by vote of the electors to issue bonds conditioned in compliance with the law then in effect, entered prior to the taking effect of Laws of 1919, p. 216, § 12, amending Rem. Code, § 4607, is not an adjudication as to the right of the school district to issue and sell said bonds after the taking effect of the amendatory act which changed the requirements as to the conditions of the bond. *State ex rel. School District No. 301 v. Clausen* 37

Judicial Power:

See CONSTITUTIONAL LAW, 1.

Judicial Sales:

Of property of decedent, see EXECUTORS AND ADMINISTRATORS, 3.

Jurisdiction:

Appellate jurisdiction in general, see APPEAL AND ERROR, 1.
Of Federal government over property ceded for military reservation, see UNITED STATES.

Jury:

Instructions in criminal proscutions, see CRIMINAL LAW, 10-12.
Custody and conduct, see CRIMINAL LAW, 13, 14.
View by jury in civil action, see TRIAL, 1.
Taking case or question from jury at trial, see TRIAL, 4, 5.
Instructions in civil action, see TRIAL, 7.

Knowledge:

Of owner of animals running at large, see ANIMALS.
Defenses to bills or notes, see BILLS AND NOTES, 2.

Labor:

Implied contracts to pay for services, see WORK AND LABOR.

Laches:

To redeem mortgaged property, see MORTGAGES, 7.

Landlord and Tenant:

Reasonableness of stipulated damages for breach of lease, see DAMAGES, 1.

1. LANDLORD AND TENANT (66)—IMPROVEMENTS BY TENANT—LIABILITY OF LESSOR. Where a pipe line constructed by the lessor was in compliance with the terms of the contract to deliver water on two of the highest points of the land, the tenant is not entitled to a credit upon his rent for the cost of reconstruction to better the service, incurred by him without authority from the lessor. *Sowle v. Johnson* 218
2. LANDLORD AND TENANT (89) — EVICTION — WAIVER — PAYMENT OF RENT. In unlawful detainer a partial eviction in the preceding year is waived by the payment of rent on the due date without question. *Sowle v. Johnson* 218
3. LANDLORD AND TENANT (129, 135)—UNLAWFUL DETAINER—DEFENSES —WAIVER BY TENDER—TIME FOR SERVING NOTICE. Tender of the amount admitted to be due for rent prior to the commencement of an action for unlawful detainer, renewed by bringing the tender into court, waives the tenant's option in the lease for an extension of time to pay rent, and precludes the defense that the rent was not due and the notice to quit premature. *Sowle v. Johnson*..... 218

Lands:

See PUBLIC LANDS.

Larceny:

By bank officer, see EMBEZZLEMENT.
Cheating and false pretenses, see FALSE PRETENSES.
Conviction of attempt to commit larceny by false pretenses, see INDICTMENT AND INFORMATION.
Words imputing crime as actionable, see LIBEL AND SLANDER.

Last Clear Chance:

See STREET RAILROADS, 2.

Leases:

See LANDLORD AND TENANT.

Letters:

Presumptions as to mailing and delivery, see EVIDENCE, 1.

Libel and Slander:

1. LIBEL AND SLANDER (3)—WORDS IMPUTING CRIME. The intent to charge plaintiff with a crime, in stating that he "or his kids" stole certain articles, is shown by the further statement that defendant saw the articles in plaintiff's barn and intended to have him arrested; and pleading and proof to that effect sufficiently shows a slander. *Boyd v. Healy* 669

Licenses:

Regulation of occupations and employments, see MUNICIPAL CORPORATIONS, 2.

Liens:

Mortgage liens, see MORTGAGES.

Life Insurance:

See INSURANCE, 1, 3-5.

Life Tables:

Admissibility in action for damages, see DAMAGES, 6.

Lights:

Violation of law requiring red light on rear of motor vehicle, see HIGHWAYS, 6.

Limitation of Actions:

Effect on state statutes of interstate commerce law regulating freight rates, see CARRIERS.

1. LIMITATION OF ACTIONS (17-1)—IMPLIED CONTRACTS NOT IN WRITING—FREIGHT TARIFFS. An action by a carrier to recover freight charges provided by the published tariffs required by the interstate commerce law, arises on contract, express or implied, which, if the contract is not in writing, must be commenced within three years under Rem. Code, § 159; and is not a statutory action which would be barred in two years, notwithstanding the terms of an interstate shipping contract are largely fixed by law. *Chicago, Milwaukee & St. Paul R. Co. v. Frye & Co.*..... 68

2. LIMITATION OF ACTIONS (37) — CONTINUING CONTRACTS — ATTORNEY'S CLAIM FOR SERVICES — DROPPING CASE FROM CALENDAR. The

Limitation of Actions—Continued.

statute of limitations does not run against an attorney's claim for services performed in a case until the termination of the action, and the action is not terminated by merely dropping the cause from the trial calendar upon entering into an agreement for a settlement, where all the matters in controversy were not fully settled. *Loewe v. Osner & Mehlhorn, Incorporated* 124

3. LIMITATION OF ACTIONS (38-1) — ACCRUAL — "OPEN ACCOUNTS." There was no "mutual, open and current account" between a shipper and a carrier, within the meaning of Rem. Code, § 166, tolling the statute of limitations, where shipments were made during a period of years, and bills were presented from time to time, and the shipper refused to pay particular items or paid less than the amount claimed on disputes and misunderstandings arising as to the amounts due on the shipments. *Chicago, Milwaukee & St. Paul R. Co. v. Frye & Co.* 68

4. LIMITATION OF ACTIONS (41)—COMPUTATION OF TIME—REIMBURSEMENT FROM PERSON ULTIMATELY LIABLE. An action against the principal maker of a promissory note upon the implied obligation which arose when the surety paid it does not accrue until the note was paid, and the statute begins to run from that time. *Holland v. Tjosevig* 142

5. SAME (67, 74)—TOLLING STATUTE—ACKNOWLEDGMENT—PERSONS BY WHOM MADE AND TO WHOM AVAILABLE. Principal and surety upon a promissory note are not within the rule that acknowledgment by one partner of a partnership debt after dissolution of the partnership does not deprive the other of the benefit of the statute of limitations. *Holland v. Tjosevig* 142

6. SAME (87)—PLEADING STATUTE AS DEFENSE—NECESSITY. Where a statute of limitation is pleaded in the complaint, it may be invoked by the defendant although not pleaded in his answer. *Holland v. Tjosevig* 142

Liquidated Damages:

See DAMAGES, 1, 2.

Liquors:

See INTOXICATING LIQUORS.

Local Assessments:

For local improvements, see HIGHWAYS, 4, 5.

Location:

Of boundary line, see BOUNDARIES, 3.

Lost Instruments:

Secondary evidence of contents, see EVIDENCE, 2, 3.

Mandamus:

1. MANDAMUS (90)—SCOPE OF RELIEF. An application for a writ of mandate does not require the court to either grant or reject it in *toto*. *Shoultes v. Quast* 510

Manslaughter:

See HOMICIDE.

Instructions in prosecution for, see CRIMINAL LAW, 11, 12.

Marriage:

Marriage of infant as emancipation, see INFANTS, 1.

1. MARRIAGE (8, 11)—COHABITATION AND REPUTATION—PRESUMPTIONS—CONTINUANCE OF ILLEGALITY. Residence and cohabitation in a state where common law marriages are recognized, after a former wife had obtained a divorce, does not legalize the prior void marriage of the husband or rebut the presumption of a continuance of the illicit relation, where neither of the parties knew of the divorce and their residence in such state was not permanent. *Blodgett v. Blodgett* 597

Married Women:

See HUSBAND AND WIFE.

Master and Servant:

Employees of municipal corporations, see MUNICIPAL CORPORATIONS, 1.

Contract of sale distinguished from employment, see SALES, 1.

Recovery for services on implied contract, see WORK AND LABOR.

1. MASTER AND SERVANT (17)—ACTION FOR WAGES—COMPLAINT. A complaint states a cause of action on *quantum meruit* for services performed when defendant sent plaintiff to superintend certain construction work engaged in by defendant, as alleged, without any agreement for the payment of a definite sum or any contract for a specified commission. *Johnson v. Pearson* 147

2. MASTER AND SERVANT (20-1)—WORKMEN'S COMPENSATION ACT—PERSONS PROTECTED—UNLAWFUL EMPLOYMENT OF MINORS—STATUTES. A girl under sixteen years of age employed in a factory without any permit in violation of Rem. Code, § 2447, is nevertheless a "workman" within the provisions of the industrial insurance act, withdrawing all civil remedies for personal injuries to workmen in extra-hazardous employment; especially in view of Rem. Code, § 6604-7, recognizing that a child less than the maximum age is a workman within the meaning of the act. *Rasi v. Howard Mfg. Co.*..... 524

3. MASTER AND SERVANT (20-21)—WORKMEN'S COMPENSATION ACT—"PLANT"—CITY BRIDGE. A city bridge over wires and tracks of an

Master and Servant—Continued.

electric railway company, over which the city, for the purpose of repairs, has exclusive control, is a part of the "plant or premises" of the city within the meaning of the workmen's compensation act, Rem. Code, § 6604-3, abolishing civil remedies and establishing industrial insurance for employees in extra hazardous employments, if injured "upon the premises or at the plant," in the course of their employment; so that the act applies to a bridge carpenter injured by contact with the electric wires of the company while engaged in repairing the bridge. *Zenor v. Spokane & Inland Empire R. Co.* 471

4. MASTER AND SERVANT (101)—ASSUMPTION OF RISK—PROMISE TO REPAIR—LIABILITY. In order to recover for personal injuries sustained by a servant while working upon a dangerous floor covered with oil, the servant must prove (1) his complaint to the foreman; (2) assurances that the conditions would be remedied; (3) reliance on the assurances; (4) injury before a reasonable time for making the repairs; and (5) that the risks were not so imminent as to require him to stop work notwithstanding the promise; this rule applying to the place of work as well as to the machinery. *Johnson v. North Coast Stevedoring Co.* 236

5. SAME (101, 161)—ASSUMPTION OF RISKS—PROMISE TO REPAIR—RELIANCE UPON—EVIDENCE—SUFFICIENCY. The evidence supports a finding that plaintiff, injured upon a floor covered with oil, relied upon the foreman's promise to obtain sawdust, when it appears that for two hours repeated complaints were made, the foreman made several attempts to get the sawdust and gave assurances that he would do so, which assurances were at no time withdrawn. *Johnson v. North Coast Stevedoring Co.* 236

Maxims:

Maxims of equity, see EQUITY.

Meander Lines:

As boundary in government patent, see PUBLIC LANDS.

Meandered Waters:

See BOUNDARIES, 1.

Measure of Damages:

For refusal to deliver goods, see SALES, 23.
For breach of implied warranty, see SALES, 25.
For conversion of property, see TROVER AND CONVERSION, 4.

Mental Capacity:

To execute deed, see DEEDS, 2.

Merger:

By conveyance of mortgaged property and assumption of debt, see MORTGAGES, 6.

Military Reservations:

Cession of jurisdiction to Federal government over property ceded for, see UNITED STATES.

Military Service:

Engaging in by insured as forfeiture of policy, see INSURANCE, 1.

Mines and Minerals:

Contract for acquisition of Federal coal lands as against public policy, see CONTRACTS, 5.

Minors:

See INFANTS.

Application of workmen's compensation act to minor employees, see MASTER AND SERVANT, 2.

Misconduct:

Of attorney, ground for disbarment, see ATTORNEY AND CLIENT.

Of trial judge, see CRIMINAL LAW, 7-9, 15.

Of jury, see CRIMINAL LAW, 13, 14.

Of counsel ground for reversal in criminal prosecutions, see CRIMINAL LAW, 17, 18.

Misrepresentation:

See FALSE PRETENSES; FRAUD.

Mistake:

Notice of discrepancy in date of mortgage and note, see BILLS AND NOTES, 2.

Modification:

Of divorce decree as to custody of child, see DIVORCE, 4, 5.

Of plan for drainage district, see DRAINS, 3.

Money:

Embezzlement, see EMBEZZLEMENT.

Money Received:

Recovery of price paid for goods, see SALES, 15, 17.

Monuments:

See BOUNDARIES, 1.

Mortgages:

Reformation of for mistake in fixing due date, see BILLS AND NOTES, 2, 4.

Mortgages—Continued.

Consideration for, see CONTRACTS, 3.

Secondary evidence of agreement to assume mortgage debt, see EVIDENCE, 2.

Of partnership property by one partner, see PARTNERSHIP, 3.

1. MORTGAGES (7)—DEBTS SECURED—LIEN WITHOUT PERSONAL OBLIGATION. A mortgage may be given to secure a lien upon real estate without any accompanying debt or personal obligation to pay, in view of Rem. Code, § 1117, which provides that, if there is no such agreement, the remedy shall be confined to the property. *Weikel v. Davis* 97

2. SAME (57)—PRIORITIES BETWEEN MORTGAGES. A conveyance to secure a pre-existing debt does not confer upon the grantee the right of a *bona fide* purchaser as against a prior unrecorded mortgage unknown to the grantee. *Malm v. Griffith*..... 30

3. SAME (92)—RIGHTS OF ASSIGNEE—HOLDER OF COUPONS. An agent for the collection of mortgage notes who advanced and paid the amount due is entitled to recover the amount from a grantee who had assumed and agreed to pay the mortgage debt. *First State Bank of Binford v. Arneson*..... 346

4. MORTGAGES (102)—ASSUMPTION OF DEBT. The purchaser of mortgaged premises who assumes payment of the mortgage becomes the principal debtor and the mortgagor a surety only. *First State Bank of Binford v. Arneson* 346

5. MORTGAGES (107, 113)—SALE BY MORTGAGOR TO MORTGAGEE—JUNIOR LIENS—RIGHT OF REDEMPTION. In view of Rem. Code, §§ 594, 595, entitling a junior mortgagee to redeem within one year after foreclosure of a senior mortgage, a senior mortgagee who took a quitclaim deed under an agreement for redemption within one year, without notice of a prior unrecorded mortgage, is not a *bona fide* purchaser for value, but takes subject to the junior mortgagee's right to redeem. *Malm v. Griffith* 30

6. SAME (111) — TRANSFER OF PROPERTY—MERGER—EXTINGUISHMENT OF DEBT. A bank holding interest coupon notes as collateral security for the obligation of its cashier who had unlawfully appropriated money to pay the mortgage, in taking a deed of the mortgaged premises in which it assumed and agreed to pay the mortgage debt thereby becomes the principal debtor, and extinguished the debt of the cashier. *First State Bank of Binford v. Arneson*..... 346

7. SAME (256, 257)—REDEMPTION—LACHES. Delay for eight years in recording a mortgage does not affect the mortgagee's right to redeem from a subsequent mortgage, where the only effect of the delay was to render it a second or junior mortgage. *Malm v. Griffith* 30

Mortuary Tables:

Admissibility in action for damages for personal injuries, see DAMAGES, 6.

Motions:

To dismiss appeal, see APPEAL AND ERROR, 13.
For dismissal or nonsuit in trial, see TRIAL, 4, 5.
For direction of verdict, see TRIAL, 6.

Motor Vehicles:

License for operation of motor vehicles for hire, see MUNICIPAL CORPORATIONS, 2, 3.

Municipal Corporations:

Certiorari to review judgment enjoining city from prosecution of public work, see CERTIORARI, 1.
Certiorari to review proceedings of municipal officers, see CERTIORARI, 2.
Regulation of jitney busses in city as denial of equal protection of laws, see CONSTITUTIONAL LAW, 5.
Street railroads, see STREET RAILROADS.

1. MUNICIPAL CORPORATIONS (65, 90)—OFFICERS AND AGENTS—REMOVAL—CIVIL SERVICE RULES. A city council has power to abolish an office and distribute the duties among other employees of the office, thereby making a saving without an addition to the force, where the civil service rules gave the incumbent no preference right of employment over those assigned to perform his duties. *State ex rel. LaGrave v. Seattle* 629

2. MUNICIPAL CORPORATIONS (354)—LICENSES (5)—USE OF STREETS—VEHICLES—LICENSE TAX. Streets, being devoted primarily to general and public, and not special or private uses, fall within the plenary legislative powers, so that a license for the operation of motor vehicles for hire is in the nature of a concession by the public, and within the discretion of the city council to grant or withhold as shall be found for the best interests of the public. *State ex rel. Schafer v. Spokane* 360

3. SAME (354)—USE OF STREETS—REGULATION OF JITNEYS—STATUTES. Municipal regulation of jitney busses is not precluded by Rem. Code, § 5562-1 *et seq.*, requiring persons operating passenger motor vehicles for hire in cities of the first class to obtain a license, etc., this act being intended only as general state legislation subject to additional local legislation not inconsistent therewith. *State ex rel. Schafer v. Spokane* 360

4. MUNICIPAL CORPORATIONS (379)—USE OF STREETS—CROSSINGS—RIGHT OF WAY—ORDINANCES. An ordinance giving right of way to cars to the right where automobiles simultaneously approach a

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street intersection, has no application where the car to the left reached the crossing an appreciable length of time in advance of the other, in which case it has the right of way. *Hull v. Crescent Manufacturing Co.* 129

5. MUNICIPAL CORPORATIONS (379, 380, 389)—USE OF STREETS—CROSSING AND PASSING—NEGLIGENCE—EVIDENCE—SUFFICIENCY. That defendant, driving a truck which was run into by plaintiff's motorcycle at a street intersection, had the right of way and was exercising due care, is established where there was evidence that he entered the street intersection first and made a lawful turn when he was hit from behind and the ordinance gave vehicles to the right the right of way and required plaintiff to look out for the truck, and there was little evidence that defendant was driving other than in a careful manner. *Saari v. Wells Fargo Express Co.*..... 415

6. MUNICIPAL CORPORATIONS (379-383, 391) — USE OF STREETS — COLLISION AT CROSSING—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. The driver of an automobile in collision with a truck at a street intersection, is guilty of contributory negligence precluding any recovery, where he was violating the speed limit and also the ordinance giving the right of way to vehicles on the right when approaching street intersections, and the driver of the truck, having the right of way, had a right to rely on the other's observance of the ordinance. *Noot v. Hunter* 343

7. MUNICIPAL CORPORATIONS (379, 392)—USE OF STREETS—NEGLIGENCE—CROSSINGS—VIOLATION OF ORDINANCE—INSTRUCTIONS. It is error to refuse a requested instruction to the effect that a violation of an ordinance giving the right of way at intersections to the automobile on the right would be negligence as a matter of law; nor is the error cured by a negative instruction on the subject stating that such right of way was not absolute and tending to lead the jury to disregard its terms. *Chilberg v. Parsons* 90

8. SAME (380, 391)—USE OF STREETS—VIOLATION OF ORDINANCE—CONTRIBUTORY NEGLIGENCE. A pedestrian crossing a street at a place other than a street intersection in direct violation of a city ordinance, is guilty of contributory negligence as a matter of law, although it would still be for the jury to determine whether the negligence contributed to the injury or whether he should have been seen in time to avoid the injury; and it would be his duty to keep a constant lookout. *Crowl v. West Coast Steel Co.*..... 426

9. MUNICIPAL CORPORATIONS (383)—COLLISION—CONTRIBUTORY NEGLIGENCE—VIOLATION OF ORDINANCE. In an action for injuries sustained in a collision at a street intersection, findings for defendant on conflicting evidence are sustained where his evidence is clear and indicated that he was driving carefully on the left side of the street

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and was run into by the defendant's motorcycle, which was exceeding the speed limit and not as near the curb as the ordinance required, and if it had been nearer the curb, the collision would have been avoided. *Walmsley v. Pickrell* 262

10. SAME (388) — NEGLIGENT DRIVING — EVIDENCE — ADMISSIBILITY. Upon an issue as to the negligence of the driver of an automobile upon the occasion of its collision with another, it is not competent to show that he was habitually careless or accustomed to drive at excessive speed. *Chilberg v. Parsons* 90

11. MUNICIPAL CORPORATIONS (390, 391)—USE OF STREETS—AUTOMOBILES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. In an action for personal injuries, sustained by a pedestrian when struck by defendant's automobile at a city street intersection, neither the negligence of the defendant nor plaintiff's contributory negligence can be determined as a matter of law, where it appears that plaintiff, after leaving a street car, hurried back across the street to pay the conductor his fare and while in plain view of the defendant, started back to re-cross the street in front of the defendant's automobile which he had last seen about one block away, and defendant drove across the city street intersection without reducing his speed below fifteen miles per hour; as the questions were for the jury. *McClure v. Wilson* 166

12. MUNICIPAL CORPORATIONS (392)—TRIAL (101)—USE OF STREETS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In view of defendant's requested instructions as to plaintiff's duty to look for approaching vehicles while on a cross-walk, and of evidence tending to show that he was struck by defendant's car while on the sidewalk, failure to give further instructions as to his contributory negligence, if he failed to look for a car while on the cross-walk, is not prejudicial error. *Reames v. Heymanson* 132

13. MUNICIPAL CORPORATIONS (392)—CROSSINGS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In an action for personal injuries sustained by a pedestrian struck by an automobile, in the absence of statute it would be error to instruct that at other places than at crossings pedestrians must keep a continuous lookout for danger, since the question of negligence is ordinarily one for the jury; but under an ordinance providing that a pedestrian shall cross streets only at crossings and shall there have the right of way over vehicles, which must travel at reduced speed, such an instruction is not error that would entitle plaintiff to a new trial. *Crowl v. West Coast Steel Co.* 426

14. MUNICIPAL CORPORATIONS (420)—STREETS—DEFECTIVE SIDEWALKS—NEGLIGENCE OF CITY—UNPRECEDENTED FLOODS. The fact that a sidewalk was tilted out of level by an unprecedented flood and remained

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so for ten days, does not show negligence on the part of the town, where practically all the sidewalks had been washed out of place or destroyed and the city, after using every effort in its power, had been unable to repair the damage before the accident. *Neer v. Sumas* 663

15. MUNICIPAL CORPORATIONS (442)—DEFECTIVE SIDEWALK—CONTRIBUTORY NEGLIGENCE. The contributory negligence of one who was tripped by the sinking of a plank in a sidewalk is a question for the jury, although plaintiff knew the walk was dangerous, where it was much used by the public and she had no knowledge of the particular defect that caused the fall; the law only requiring due care under the circumstances. *Fisher v. Anacortes* 191

16. SAME (435) — DEFECTIVE SIDEWALK — CITY'S NOTICE OF DEFECT. Whether a city had notice that a plank in a sidewalk would sink and trip a pedestrian is a question for the jury, where the walk had been down for eleven years, the boards were decayed and loose and the condition had existed for a considerable period of time. *Fisher v. Anacortes* 191

17. MUNICIPAL CORPORATIONS (566, 567)—CLAIMS—SUFFICIENCY—VARIANCE. Under a claim against a city for overflowing certain described tracts of land, damages to other lands cannot be recovered, in view of the city charter requiring all claims to contain the items of damages and to accurately describe the injury, as a prerequisite to action. *Neely v. Seattle* 266

18. SAME. Under a claim against a city for overflowing all of plaintiff's lands, recovery may be had for damages to only part. *Neely v. Seattle* 266

Murder:

See HOMICIDE.

Mutual Benefit Insurance:

See INSURANCE, 3-5.

Mutuality:

Necessity for mutuality of obligation, see CONTRACTS, 1, 4.

Names:

Partnership names, recording, see PARTNERSHIP, 1.

Navigable Waters:

Bodies and streams of water not capable of navigation, see WATERS AND WATER COURSES.

Negligence:

Of bank in paying forged checks, see BANKS AND BANKING, 2, 3.

Negligence—Continued.

Of carrier causing loss of or injury to goods, see CARRIERS, 2, 3.
Inadequate and excessive damages, see DAMAGES, 3.
Damages in general, see DAMAGES, 3-6.
In use of highway, see HIGHWAYS, 6-11.
Of employers, see MASTER AND SERVANT, 2-5.
Risks assumed by servant, see MASTER AND SERVANT, 4, 5.
Causing injuries to persons using streets, see MUNICIPAL CORPORATIONS, 4-16.
Injuries from defects or obstruction in streets, see MUNICIPAL CORPORATIONS, 14-16.
Of person injured by defects or obstructions in street, see MUNICIPAL CORPORATIONS, 15.
Of city in maintenance of defective sidewalk, see MUNICIPAL CORPORATIONS, 14.
Liability for defects in overhead crossing, see RAILROADS.
Of person injured by street car, see STREET RAILROADS.
Injuries by flooding land, see WATERS AND WATER COURSES.

1. NEGLIGENCE (3)—FIRES—DUTY TO CONTROL. An owner of premises must exercise reasonable care to prevent the spread of fire, started on his premises without his fault. *Jordan v. Spokane, Portland & Seattle R. Co.* 476

2. SAME (3). Negligence on the part of a railroad company in permitting a fire, discovered on its premises, to spread to plaintiff's property may be inferred, and plaintiff makes out a prima facie case, where there was evidence that defendant had knowledge of it when it was a small affair easily extinguishable, with men at hand for the purpose, and that the season was unusually dry and the surroundings easily ignitable. *Jordan v. Spokane, Portland & Seattle R. Co.* 476

Negotiable Instruments:

See BILLS AND NOTES.
Warehouse receipts, see WAREHOUSEMEN.

New Trial:

Review of discretionary ruling on motion, see APPEAL AND ERROR, 15-17.
In criminal prosecutions, see CRIMINAL LAW, 14.

1. NEW TRIAL (24)—GROUNDS—WEIGHT OF EVIDENCE. The fact that the trial court may have considered an award inadequate is not ground for granting the defendant a new trial. *Ross v. Rose*... 273

2. NEW TRIAL (55)—ORDER—SCOPE. In the granting of a new trial in an action on a contract to pay a fixed price per foot for the digging of a well, defended on the ground that plaintiff had guaranteed to bring in water and had breached his contract by ceasing

New Trial—Continued.

work, it is proper to permit the plaintiff to make a further test of the well, since he would be entitled to produce new evidence; but it is error to order that plaintiff be permitted to dig the well deeper to bring in water, since he cannot change the theory of or revive the contract after the breach. *Hurd v. Wysong*..... 202

Nonsuit:

On trial, see TRIAL, 4, 5.

Notes:

Promissory notes, see BILLS AND NOTES.

Notice:

Defenses to bill or note, see BILLS AND NOTES, 2.
Proceedings for sale of land of decedent under order of court, see EXECUTORS AND ADMINISTRATORS, 3.
Of accident to insurer, see INSURANCE, 2.
To deliver possession of leased premises, see LANDLORD AND TENANT, 3.
Defects or obstructions in street as affecting liability for negligence, see MUNICIPAL CORPORATIONS, 16.
Estoppel to deny notice of partnership, see PARTNERSHIP, 4.
Record of written instrument as notice, see RECORDS.

Objections:

Review as dependent on objections made on trial, see APPEAL AND ERROR, 3.

Obligation of Contract:

Laws impairing, see CONSTITUTIONAL LAW, 3.

Officers:

Deposit of public funds in county depositary, see COUNTIES.
Embezzlement, see EMBEZZLEMENT.
Municipal officers, see MUNICIPAL CORPORATIONS, 1.
Receivers, see RECEIVERS.

Opinion Evidence:

Reception at trial of civil action, see TRIAL, 2.

Opinions:

Fraudulent representations as matters of fact or of opinion, see FRAUD.

Option:

Oral option to sell land, see FRAUDS, STATUTE OF, 2.
Effect as to sales, see SALES, 4.

Oral Contracts:

See FRAUDS, STATUTE OF.

Oral Evidence:

See EVIDENCE, 6-8.

Orders:

Granting new trial, scope of, see NEW TRIAL, 2.

Ordinances:

Violation of ordinance by driver of auto, see MUNICIPAL CORPORATIONS, 4-9.

Original Promise:

To answer for debt, default or miscarriage of another, see FRAUDS, STATUTE OF, 1.

Ownership:

Of deposits in bank, see EMBEZZLEMENT, 2.

Parol Evidence:

See EVIDENCE, 6-8.
To show mistake in fixing due date of mortgage, see BILLS AND NOTES, 4.
Of trade meaning in contract of sale, see CUSTOMS AND USAGES.
Of contents of writing, see EVIDENCE, 2, 3.
To establish trust, see TRUSTS, 2.

Partial Invalidity:

Effect of partial invalidity of statutes, see STATUTES, 1.

Parties:

Substitution of parties plaintiff, see ABATEMENT AND REVIVAL.
Death as ground for abatement, see ABATEMENT AND REVIVAL.
Misconduct of as harmless error, see APPEAL AND ERROR, 23.
Rights and liabilities as to costs, see COSTS.
Plaintiff in action to enforce promise to pay debt of another, see FRAUDS, STATUTE OF, 1.
Joint interest, see JOINT ADVENTURES.
Persons concluded by judgment, see JUDGMENT, 4.
To contract of sale, see SALES, 2, 3.

1. PARTIES (3, 4)—BANKS AND BANKING (7)—ASSETS ON INSOLVENCY—REAL PARTY IN INTEREST—TRUSTEES—STATE BANK EXAMINER. A bank, being the direct beneficiary of a reciprocal guaranty of paper taken over at the time of its organization, and entitled to collect the paper, the state bank examiner, taking over the bank upon its insolvency, may maintain an action on the guaranty as the real party in interest, under Rem. Code, § 179. *Moore v. Baasch*..... 568

Partnership:

See JOINT ADVENTURES.

Amendment of complaint to conform to proof, see PLEADING, 1.

1. PARTNERSHIP (20)—FIRM NAME—RECORDING. A nontrading partnership for the growing of potatoes is not within the recording act, Rem. Code, § 8359, relating to limited partnerships for the transaction of mercantile, mechanical or manufacturing business. *Gordon v. Marburger* 496

2. PARTNERSHIP (36)—RIGHTS AND LIABILITIES OF PARTNERS—SALES. Where the buyer of a car load of prunes and the broker had a partnership interest in the purchase and the broker knew the trade meaning of the words "bulk basis" used in the contract, the buyer, as a partner, is conclusively presumed to have knowledge thereof. *Gile v. Tsutakawa* 366

3. PARTNERSHIP (38)—AUTHORITY—EXECUTION OF NOTE AND MORTGAGE. One member of a nontrading partnership for the growing of potatoes has no power to borrow money and mortgage the crop belonging to the firm, where he had no duties making it necessary and there was no custom of dealing authorizing it. *Gordon v. Marburger* 496

4. SAME (41)—ESTOPPEL TO DENY PARTNERSHIP. The lender of money to the active member of a nontrading partnership for the growing of potatoes cannot claim want of notice of the partnership where he prepared the rent receipt evidencing the lease, which named the dormant partner as a member of the firm. *Gordon v. Marburger* 496

Payment:

Of forged checks, see BANKS AND BANKING, 1-3.

Of checks by drawee, see BILLS AND NOTES, 3.

Of tax assessed for road improvements, see HIGHWAYS, 4, 5.

Of rent as waiver of eviction, see LANDLORD AND TENANT, 2.

Of note by surety as affecting limitations, see LIMITATION OF ACTIONS, 4.

Price of goods sold, see SALES, 8.

Recovery of price paid for goods, see SALES, 15, 17.

Of judgment by trustee, see TRUSTS, 1.

Penalties:

Under contracts, see DAMAGES, 1, 2.

Performance:

Of contract, see BROKERS, 2-4.

Personal Injuries:

Inadequate and excessive damages, see DAMAGES, 3.

Pleading damages, see DAMAGES, 4, 5.

Personal Injuries—Continued.

From negligence in use of highway, see HIGHWAYS, 9-11.
To employee or third persons, see MASTER AND SERVANT, 2-5.
Collision with automobile, see MUNICIPAL CORPORATIONS, 8, 9, 11-13.
From defects or obstructions in street or public place, see MUNICIPAL CORPORATIONS, 14-16.
From defects in overhead crossing, see RAILROADS.
To persons on or near street railroad tracks, see STREET RAILROADS.

Personal Property:

Situs for taxation, see TAXATION, 2.
Wrongful conversion, see TROVER AND CONVERSION.

Petition:

For sale of decedent's property, see EXECUTORS AND ADMINISTRATORS, 3.

Place:

Of taxation, see TAXATION, 2.

Plant:

Injury to servant at "plant" of employer, see MASTER AND SERVANT, 3.

Plats:

Of government lands, see PUBLIC LANDS, 2.

Plea:

Withdrawal of plea of guilty, see CRIMINAL LAW, 1.

Pleading:

Review of rulings as dependent on presentation of objection in lower court, see APPEAL AND ERROR, 3.
Waiver of special appearance by answer to merits, see APPEARANCE.
For loss or injury to goods, see CARRIERS, 3.
Certified copies of as evidence, see CRIMINAL LAW, 5.
General or special damages, see DAMAGES, 4, 5.
In action on separation agreement, see HUSBAND AND WIFE, 2.
Indictment or criminal information or complaint, see INDICTMENT AND INFORMATION.
Actions for libel or slander, see LIBEL AND SLANDER.
Pleading statute of limitation as defense, see LIMITATION OF ACTIONS, 6.
In action for wages, see MASTER AND SERVANT, 1.
By or against receivers, see RECEIVERS.
In action for services, see WORK AND LABOR, 4.

1. PLEADING (104)—AMENDMENTS TO CONFORM TO PROOF. The complaint in an action in equity for a partnership property may be amended to conform to proof showing plaintiff was entitled to re-

Pleading—Continued.

cover for advances and services, where it develops that the partnership had no title to the property and plaintiff's allegations were made in good faith. *Williams v. Snow* 329

2. PLEADING (151)—REPLY—STRIKING AFFIRMATIVE MATTER. Affirmative matter in a reply not constituting a defense to the plea of the statute of limitations is properly struck out. *Loewe v. Osner & Mehlhorn, Incorporated* 124

Pledges:

1. PLEDGES (7)—WAIVER—SALE OF COLLATERAL WITHOUT NOTICE. A bank, holding interest coupons secured by mortgage as collateral security for the debt of its cashier for appropriating money to their payment, will be presumed to have realized the amount due where it disposed of the collateral without notice to the debtor. *First State Bank of Binford v. Arneson* 346

Police Power:

Of state, see CONSTITUTIONAL LAW, 2.

Policy:

Of insurance, see INSURANCE.

Port Districts:

Interest on funds of port district, see COUNTIES, 1.

Possession:

Unlawful possession of liquor, see INTOXICATING LIQUORS.

Retaking possession of goods sold under conditional sales contract, see SALES, 26.

Possessory Actions:

See QUIETING TITLE.

Post Office:

Presumption as to delivery of letters, see EVIDENCE, 1.

Powers:

Of receiver of insolvent corporation, see CORPORATIONS, 2.

Practice:

See APPEAL AND ERROR; COSTS; CRIMINAL LAW; NEW TRIAL; PLEADING.

Nonsuit, see TRIAL, 4, 5.

Preferences:

By insolvent corporation, see CORPORATIONS, 2.

Prejudice:

Ground for reversal in civil actions, see APPEAL AND ERROR, 23-27.
Ground for reversal in criminal prosecution, see CRIMINAL LAW, 15, 17, 18.

Premature Action:

For breach of contract of sale, see SALES, 20.

Prescription:

Establishment of highways, see HIGHWAYS, 1-3.

Presentment:

Of claim against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 1, 2.

Presumptions:

As to delivery of letter, see EVIDENCE, 1.
Arising from residence and cohabitation of parties, see MARRIAGE.
As to knowledge of partner as to trade meaning, see PARTNERSHIP, 2.
On denial of writ to restrain admitting to bail persons charged with murder, see PROHIBITION.
As to service rendered to persons in family relation, see WORK AND LABOR, 1.

Principal and Agent:

See BROKERS.
Liability of agent for false representations in sale of land, see FRAUD.
Profit sharing in purchase of lands by agent, see JOINT ADVENTURES, 1, 2.
Record of agent's contract for share in profits of lands purchased, as notice to subsequent purchasers, see RECORDS.

1. PRINCIPAL AND AGENT (9)—EVIDENCE OF AGENCY—SUFFICIENCY. In an action against the owner of land for fraud of the agent in pointing out the wrong land, the evidence is insufficient to show that he was agent for the purpose of pointing out the land where it merely appears that he was the broker authorized to make the trade, and that the owner suggested that plaintiff go and see the land, and that the two had had considerable other business between themselves, and the owner was to pay part of the commission. *Walker v. Callendar* 516

2. PRINCIPAL AND AGENT (36½) — AUTHORITY — NEGOTIABLE INSTRUMENTS—INDORSEMENT. Authority to indorse checks payable to a fruit company is not conferred by a statement certifying that the agent was authorized to "transact any and all business" for the company, in the absence of any circumstances touching the nature

Principal and Agent—Continued.

of the business from which the power might be implied. *Coleman v. Seattle National Bank* 80

3. PRINCIPAL AND AGENT (39)—AUTHORITY OF AGENT—ADMISSIBILITY OF EVIDENCE. It is not error to exclude evidence of conversations as to an agent's authority to bind a lessor by an agreement respecting improvements, where his authority as an agent had been terminated and he had informed appellants that the lessor refused to do anything in regard to the matter. *Sowle v. Johnson* 218

4. SAME (41)—AUTHORITY OF AGENT—DECLARATIONS OF AGENT. The authority of a real estate broker to show land belonging to his principal cannot be shown by declarations of the agent. *Walker v. Callendar* 516

Principal and Surety:

Accrual of action by surety against principal maker of note, see LIMITATION OF ACTIONS, 4.

Liability of purchaser assuming mortgage debt as principal, and of mortgagor as surety, see MORTGAGES, 4.

1. PRINCIPAL AND SURETY (59)—REMEDIES OF SURETY—AGAINST PRINCIPAL AFTER PAYMENT OF DEBT. Where one of two makers of a joint and several note signed as an accommodation maker and surety only, the other receiving all the consideration, he may, upon paying the note, recover the amount paid from his comaker. *Holland v. Tjosevig* 142

Priorities:

Between mortgages, see MORTGAGES, 2.

Process:

Waiver of objection to process by appearance, see APPEARANCE.

Issuance of from state courts over tracts embraced in military reservation, see UNITED STATES.

Production:

Of documentary evidence, see EVIDENCE, 5.

Of documents by witness subpoenaed *duces tecum*, see WITNESSES, 1-5.

Profits:

Profit sharing agreements, see JOINT ADVENTURES.

Recovery of on breach of contract, see SALES, 16.

Prohibition:

Appealability of orders, see APPEAL AND ERROR, 1.

Supersedeas on appeal from denial of writ, see APPEAL AND ERROR, 11.

Prohibition—Continued.

1. PROHIBITION (38)—APPLICATION—EVIDENCE AND PRESUMPTIONS—BURDEN OF PROOF. On prohibition to restrain a judge from admitting to bail persons charged with murder in the first degree, the presumption is in favor of a return alleging a proper exercise of his discretion, although it does not negative in terms the exception in Const., art. 1, § 20, by reciting that the proof was not evident or the presumption great; the burden being upon the prosecuting attorney seeking the writ to directly aver and prove the contrary. *State ex rel. Brown v. Superior Court* 287

Promissory Notes:

See BILLS AND NOTES.

Property:

Division of on divorce, see DIVORCE, 2.
Taking for public use, see EMINENT DOMAIN.
Obtaining property by false pretenses, see FALSE PRETENSES.
Ceded to Federal government for military reservation, see UNITED STATES.

Proximate Cause:

Of collision with street car at crossing, see STREET RAILROADS, 2.

Public Lands:

Contract for acquisition of public lands in contravention of public policy, see CONTRACTS, 5.

1. PUBLIC LANDS (9)—SURVEY—MEANDERS. The government "meanders" of a stream between two government lots are not run as boundaries but only to ascertain the acreage of the tracts, and the stream constitutes the real boundary, regardless of the area. *Rue v. Oregon & Washington R. Co.* 436

2. PUBLIC LANDS (9)—SURVEY—MEANDER LINES. The government's original plat and meander of a stream constituting the boundary between two lots cannot be impeached or contradicted by the testimony of a surveyor who made a visual survey without actual measurements, as a nonexpert. *Rue v. Oregon & Washington R. Co.* 436

3. PUBLIC LANDS (9)—BOUNDARIES (13)—MEANDERS—EVIDENCE. The government meander of a stream constituting the boundary between two lots is not shown to be so grossly inaccurate as to amount to a fraud by the nonexpert testimony of a surveyor who, from a visual survey, stated that there was a discrepancy in the acreage called for of about forty acres or half of the tract. *Rue v. Oregon & Washington R. Co.* 436

Public Policy:

Contracts against public policy, see CONTRACTS, 5.

Public Schools:

See SCHOOLS AND SCHOOL DISTRICTS.

Public Use:

Taking property for public use, see EMINENT DOMAIN.

Punishment:

Review of discretion in imposing maximum sentence, see CRIMINAL LAW, 16.

Of minors, see INFANTS, 2.

Quantum Meruit:

See WORK AND LABOR.

Question for Jury:

In action for injuries through frightening horse in negligent driving of auto, see HIGHWAYS, 9, 10.

Notice of accident to insurer, see INSURANCE, 2.

In action for injuries to person struck by auto, see MUNICIPAL CORPORATIONS, 8, 11, 13.

Notice to city of defect in sidewalk, see MUNICIPAL CORPORATIONS, 16.

Quieting Title:

See BOUNDARIES, 4.

1. QUIETING TITLE (20, 25)—FORM OF REMEDY—TITLE. A suit to quiet title to a lot described by metes and bounds according to lines shown on the plat, involving an issue as to the boundaries, is a possessory action under Rem. Code, § 785, in which the superior title, whether legal or equitable, prevails. *Rue v. Oregon & Washington R. Co.* 436

Railroads:

Carriage of goods and passengers, see CARRIERS.

Regulation by interstate commerce law of rates and charges, see COMMERCE.

Negligence in control of fire on right of way, see NEGLIGENCE.

Railroads in city streets, see STREET RAILROADS.

1. RAILROADS (34)—LIABILITY—MAINTENANCE OF OVERHEAD CROSSINGS—STATUTES. Under Rem. Code, § 8733-5, providing that the framework and abutments of an overhead highway and railway crossing shall be maintained by the railway company, and the roadway thereover and the approaches by the county or municipality, everything above the framework and abutments would be part of the roadway, and the railway company would not be responsible for a defective bulkhead or railing above the planking of the roadway. *Pridmore v. Northern Pacific R. Co.* 305

Railroads—Continued.

2. SAME. In such a case, if the curve was dangerous, there could be no recovery against the railway company, since the danger would depend upon protection by a barrier or guard-rail. *Pridmore v. Northern Pacific R. Co.* 305

Rates:

For shipment of live stock, see CARRIERS, 4-6.

Real Estate Agents:

See BROKERS.

Real Property:

Sale of real estate of decedent, see EXECUTORS AND ADMINISTRATORS, 3.
Effect of statute of frauds on agreement relating to real property, see FRAUDS, STATUTE OF, 2.

Reasonable Doubt:

Instructions as to reasonable doubt, see CRIMINAL LAW, 10.

Receipts:

Warehouse receipts, see WAREHOUSEMEN.

Receivers:

Of corporations in general, see CORPORATIONS, 2.

1. RECEIVERS (72)—REMEDIES OF RECEIVER IN RECEIVERSHIP PROCEEDINGS. Where the receiver of an insolvent corporation had a right, on behalf of creditors, to avoid a bill of sale and lease made in fraud of creditors, and all the parties are before the court upon an order to show cause why he should not deliver the property pursuant to the fraudulent bill of sale, he may interpose the fraud by way of an affirmative defense, and the court has jurisdiction to determine the merits without resort to an independent action. *Wirkkala v. Wirkkala Brothers Lumber & Box Co.* 137

Records:

Transcript on appeal or writ of error, see APPEAL AND ERROR, 13.
Delay in recording mortgage as affecting right of redemption, see MORTGAGES, 7.
Of firm name, see PARTNERSHIP, 1.

1. RECORDS (3) — RECORDING WRITTEN INSTRUMENTS—NOTICE. The recording of an agent's contract for a share in the profits of lands purchased is notice to subsequent purchasers of his rights. *Donahue v. Haskamp* 562

Redemption:

From mortgage foreclosure, see MORTGAGES, 5, 7.

Reference:

See ARBITRATION AND AWARD.

Reformation of Instruments:

Parol evidence to show mistake in fixing due date of mortgage, see BILLS AND NOTES, 4.

Regulation:

Of jitney busses for hire, see MUNICIPAL CORPORATIONS, 2, 3.

Rehearing:

See NEW TRIAL.

Release:

Of party from obligations of judgment, see JUDGMENT, 1.

Reliance:

By servant on promise to repair, see MASTER AND SERVANT, 4, 5.

Remand:

Matters determined with remand, see APPEAL AND ERROR, 28.

Removal:

Of public officers or employees, see MUNICIPAL CORPORATIONS, 1.

Rent:

Payment of as waiver of eviction, see LANDLORD AND TENANT, 2.

Repairs:

Promise to repair defects in machinery or appliances, see MASTER AND SERVANT, 4, 5.

Repeal:

Implied repeal of laws relating to possession of liquors, see INTOXICATING LIQUORS, 2.

Of statute, see STATUTES, 5.

Reply:

Striking out matter in reply, see PLEADING, 2.

Reputation:

Proof of marriage, see MARRIAGE.

Requests:

For instructions in civil actions, see TRIAL, 7.

Rescission:

Of guaranty agreement, see GUARANTY, 2.

Of contract for sale of goods, see SALES, 9.

Res Gestae:

In criminal prosecutions, see CRIMINAL LAW, 2.

Res Judicata:

See JUDGMENT, 4, 5.

Restitution:

Pending appeal taken after payment of judgment distributing fund in court, see APPEAL AND ERROR, 10.

Revenue:

See TAXATION.

Review:

See CERTIORARI.
In civil actions, see APPEAL AND ERROR.
In criminal prosecution, see CRIMINAL LAW, 15-18.

Revival:

Of action, see ABATEMENT AND REVIVAL.

Risks:

Assumed by employee, see MASTER AND SERVANT, 4, 5.

Roads:

Streets in cities, see MUNICIPAL CORPORATIONS, 2-16.
Overhead crossings, see RAILROADS.

Rules:

Of mutual benefit company, see INSURANCE, 3.

Salary:

Recovery on *quantum meruit*, see WORK AND LABOR, 3.

Sales:

Arbitration of disputes under contract for sale of goods, see ARBITRATION AND AWARD.
Implied warranty in sale of bank stock, see BANKS AND BANKING, 4.
Construction of contract, see CONTRACTS, 2, 4.
Parol evidence of trade meaning, see CUSTOMS AND USAGES.
Parol evidence to show fraud, see EVIDENCE, 7.
Parol evidence of warranty, see EVIDENCE, 8.
Obtaining goods by false pretenses, see FALSE PRETENSES.
Remedy at law as bar to relief by injunction, see INJUNCTION.
Presumptions as to knowledge of partner as to trade meaning, see PARTNERSHIP, 2.
Collateral securities, see PLEDGES.
Wrongful retaking possession by vendor in conditional sales contract, see TROVER AND CONVERSION.

Sales—Continued.

1. SALES (3)—CONTRACTS (40, 41)—VALIDITY—SALES DISTINGUISHED FROM EMPLOYMENT—VIOLATION OF FEDERAL FOOD CONTROL ACT. A contract between a packing company and the owner of a fishing vessel whereby the owner of the vessel agreed to fish in certain waters and the company agreed to purchase the fish, paying so much per fish for all fish caught and guaranteeing a certain sum for the catch, is primarily a contract of sale and not of employment; and any guaranty of price in excess of the prices fixed by the Federal food control act is unenforceable, since such act is controlling. *Henrikson v. Pacific Coast Packing Co.* 644

2. SALES (6)—PARTIES LIABLE—EVIDENCE—SUFFICIENCY. In an action on a contract for the manufacture of steel beds, assumed by a corporation organized by a person who ordered and paid for the first lot of beds, the company and not the individual is liable, where the orders were entered against the company and checks in partial payment were received from the company, with whom all the business was transacted. *American Iron & Wire Works v. Fischer*..... 279

3. SALES (6, 19)—PARTIES—RELATION TO TRANSACTION. A contract for the sale of a car load of prunes is not affected by the fact that by mistake one of the duplicate copies was made out on a printed form of another company. *Gile v. Tsutakawa* 366

4. SALES (9, 28)—OPTION. An option to purchase, one accepted, becomes a binding contract. *Sussman v. Gustav* 459

5. SAME (19)—ESTOPPEL OR WAIVER. The purchasers of a car load of prunes are estopped to claim that their contract was with another company represented by the same broker, where, after the car was shipped and bill of lading and draft sent, they complained about the price, offering to pay part, and did not deny the contract. *Gile v. Tsutakawa* 366

6. SALES (29)—CONSTRUCTION—SUBJECT-MATTER—QUANTITY AND ASCERTAINMENT THEREOF. A contract for the sale of three tons of cascara bark and also all bark that defendant "shall peel or have for sale during the season" does not include bark in excess of three tons in the possession of the defendant which he did not peel and was not offering for sale that season. *Gardiner v. Gyorog*..... 660

7. SALES (33)—CONSTRUCTION—TRANSPORTATION—PROCURING CARS. The purchaser of junk to be delivered f. o. b. Seattle is under no obligation to furnish the cars, even if he later offered to assist in obtaining them. *Sussman v. Gustav* 459

8. SAME (36)—TIME OF PAYMENT—TENDER. Upon a sale of junk f. o. b. cars, delivery and payment are simultaneous acts, and the buyer need not tender or pay the price before the cars are loaded. *Sussman v. Gustav* 459

Sales—Continued.

9. SALES (59)—RESCISSION BY BUYER—CONDITIONS PRECEDENT—PLACING IN STATU QUO. In an action to rescind a sale or trade of an automobile, procured by fraud, inability to place the parties in *statu quo* cannot be asserted, where plaintiff offered to take back his car, and the condition of the defendant's car was such that its use was of no value to the plaintiff, and defendant raised no issue as to the value of such use. *Wells v. Walker*..... 332

10. SAME (67)—DELIVERY—DEMAND. Upon a sale of junk f. o. b. Seattle, the seller is bound to load the cars within a reasonable time, without any demand by the buyer. *Sussman v. Gustav*... 459

11. SALES (68, 75) — PERFORMANCE OR BREACH—TENDER—INSPECTION. An offer to buy for plaintiff certain second-hand wire rope to be selected and inspected by defendant at Duluth, accepted by plaintiff, was breached when the cars tendered at Seattle were refused because not inspected and unsatisfactory, where defendant inspected and accepted some of the rope without notifying plaintiff and such inspection was a matter solely between the defendant and the Duluth dealer furnishing the rope. *Mill & Mine Supply Co. v. Seattle Frog & Switch Co.*..... 351

12. SALES (103)—WARRANTIES—INSPECTION, EXAMINATION OR TEST. Upon an issue as to whether there was a collateral oral warranty that articles manufactured for defendant's special purpose would meet the requirements, the fact that plaintiff installed one of the articles to ascertain if it would meet the requirements must be taken as an admission of an outstanding warranty as to its efficiency. *Gleason Company v. Carman* 536

13. SALES (105)—IMPLIED WARRANTY—BREACH—DAMAGES. The sale of a tractor without inspection or test, with full knowledge of the particular purposes for which it was desired, impliedly warrants the fitness of the machine; entitling the buyer to recover damages for breach of warranty upon its inability to do the required work. *Hausken v. Hodson-Feenaughty Co.* 606

14. SALES (108)—IMPLIED WARRANTIES — FITNESS FOR PURPOSE INTENDED. Upon an executory sale by a manufacturer of articles to be made for a special purpose, there is an implied warranty of fitness for the purpose intended. *Gleason Company v. Carman*..... 536

15. SALES (127)—ACTIONS FOR PRICE—DEFENSES—FRAUDULENT REPRESENTATIONS. It is a good defense to an action for the price of special electric light fixtures manufactured for a special use in the defendant's shop, that defendant was induced to enter into the contract by false representations as to the efficiency of the articles, being without knowledge of the subject matter, even if the seller did not know the statements were false. *Gleason Company v. Carman* 536

Sales—Continued.

16. SALES (143)—DAMAGES (113)—PROSPECTIVE PROFITS—EVIDENCE—SUFFICIENCY. The prospective profits in a contract for the manufacture of steel beds for defendant are not proven with reasonable certainty where plaintiff, after testifying that he would have made a profit of about one dollar a bed, admitted on cross-examination that he had stated that he would not make any profit on the first order, but expected to make thirty to thirty-five cents a bed on future business, and the testimony was indefinite as to the number actually manufactured. *American Iron & Wire Works v. Fischer* 279

17. SALES (144)—REMEDIES OF BUYER—RECOVERY OF PRICE. Upon a sale of hay to be measured by the buyer, which measurement was fairly made, the buyer is entitled to recover an advance made on the purchase price, where the sellers were at fault in refusing to deliver unless payment was made upon their measurements and claimed a modification of the contract which was not shown to have been made by a person having authority to make any modification. *Jahn & Co. v. Wright* 164

18. SALES (150)—ACTION FOR BREACH—CONDITIONS PRECEDENT—ABILITY AND READINESS TO PERFORM. A party claiming damages for breach of contract to deliver box shooks, need not allege or prove ability and willingness to perform on his part, where before the time for performance the other party gave notice that it would not perform. *Citizens Bank v. Willing* 464

19. SALES (151)—ACTIONS—DEFENSES—TENDER. A buyer of junk, having waited a year for delivery, is not obligated to accept a tender after bringing suit for damages. *Sussman v. Gustav* 459

20. SAME (151)—ACTIONS (29)—DEFENSES—PREMATURE ACTION. An action for breach of a contract to sell and deliver junk f. o. b. cars, commenced ten day after tender of the price, is not premature, where the seller, after long delays, still refused to fix any time for delivery. *Sussman v. Gustav* 459

21. SALES (152)—REMEDIES OF BUYER—ACTION FOR BREACH—EVIDENCE—ADMISSIBILITY. In a buyer's action for damages for failure to deliver soya bean oil to be shipped from the Orient, the market value on the day of the breach may be shown by a trade journal of repute and general circulation throughout the United States, generally relied upon by the trade everywhere, in which quotations were given and sales reported at the place of delivery, which was the principal Pacific Coast point for the importation and distribution of soya bean oil. *Marden, Orth & Hastings Corporation v. Trans-Pacific Corporation* 296

22. SALES (153)—BREACH OF CONTRACT—EVIDENCE—SUFFICIENCY. A contract made in November for the sale of soya bean oil for im-

Sales—Continued.

mediate shipment from the Orient was finally breached February 19th following, where upon offer and negotiations for extending the time for delivery, the buyer fixed that time as the limit within which time for delivery could be arranged; failure to reply thereto constituting refusal to deliver as of that date. *Marden, Orth & Hastings Corporation v. Trans-Pacific Corporation*..... 296

23. SALES (155)—REMEDIES OF BUYER—DAMAGES—PURCHASE OF GOODS ELSEWHERE. Upon refusal of the vendor to deliver soya bean oil "c. i. f. Seattle," the buyer is entitled to recover the difference between the contract price and the market price at Seattle at the time of the breach. *Marden, Orth & Hastings Corporation v. Trans-Pacific Corporation* 296

24. SALES (164-1) — WARRANTY—BREACH—DAMAGES—EVIDENCE—SUFFICIENCY. Upon an issue as to the damages from breach of warranty of a tractor, sold for $800.91 and claimed to be worthless, a prima facie case as to the value of the machine at the time it was sold is not necessarily made out by testimony of an apparently hostile witness, formerly defendant's agent, that at the time of the trial (two years after the sale), it was worth only the price of junk, which witness thought was $20 a ton and that it weighed about 5,000 pounds. *Hausken v. Hodson-Feenaughty Co.* 606

25. SALES (165)—WARRANTY—BREACH—MEASURE OF DAMAGES. The measure of damages for breach of implied warranty as to the fitness of a tractor for the purposes required, where the price was paid in advance and the machine retained notwithstanding the discovery of defects, is the actual damages which are the natural and probable result of the breach and fairly within the contemplation of the parties; and hence includes special damages incurred in doing the necessary work by teams, under immediate emergencies in the early part of the current season, where the seller was notified of the defects and attempted to remedy them; but not to similar losses in the ensuing year. *Hausken v. Hodson-Feenaughty Co.* 606

26. SALES (182)—CONDITIONAL SALES—REMEDIES OF SELLER—RETAKING POSSESSION—IMPAIRMENT OF SECURITY—EVIDENCE—SUFFICIENCY. Before the vendor in a conditional sales contract can take possession of the property under the insecurity clause in the contract, it must show that the vendee had committed or was about to commit some act tending to impair the security, and it is not sufficient to show unpaid storage charges which did not impair the security. *Richardson v. Great Western Motors, Incorporated* 324

Schools and School Districts:

Laws impairing obligation of contracts, see CONSTITUTIONAL LAW, 3.
Laws relating to actions against school district as class legislation, see CONSTITUTIONAL LAW, 4.

Schools and School Districts—Continued.

Conclusiveness of judgment authorizing issue of bonds by district, see JUDGMENT, 5.

Laws relating to actions against school districts, see STATUTES, 1, 3, 4.

1. SCHOOLS AND SCHOOL DISTRICTS (34)—BONDS—POWER TO ISSUE—CONDITIONS—STATUTES. After the taking effect on June 12 of Laws of 1919, p. 216, § 12, amending Rem. Code, § 4607, and providing that school district bonds for erecting permanent buildings shall be made payable in semi-annual installments, the school district has no power to issue or sell bonds payable in ten years, in conformity to the former law, notwithstanding the issue was authorized by an election and adjudged by a court to be valid before the amendment of 1919 took effect. *State ex rel. School District No. 301 v. Clausen* 37

Secondary Evidence:

In civil actions, see EVIDENCE, 2, 3.

Selection:

Of homestead, see HOMESTEAD, 3-5.

Self-Serving Declarations:

See CRIMINAL LAW, 2.

Sentence:

In criminal prosecutions, see CRIMINAL LAW, 16.

Separation:

Agreement between husband and wife, see HUSBAND AND WIFE, 1-3.

Service:

Implied contract to pay for services, see WORK AND LABOR.

Shipping:

Carriage of goods, see CARRIERS, 1-3.

Sidewalks:

Injuries from defective condition, see MUNICIPAL CORPORATIONS, 14-16.

Situs:

Of property subject to taxation, see TAXATION, 2.

Slander:

See LIBEL AND SLANDER.

Special Appearance:

See APPEARANCE.

State Bank Examiner:

As party plaintiff in action on guaranty agreement, see PARTIES.

States:

Laws impairing obligation of contracts, see CONSTITUTIONAL LAW, 3.

Statutes:

See FRAUDS, STATUTE OF; INTOXICATING LIQUORS, 1, 2; WAREHOUSEMEN.
Treble damages for trespass by animals, see ANIMALS.
Acceptance of negotiable paper, see BILLS AND NOTES, 1.
Laws impairing obligation of contracts, see CONSTITUTIONAL LAW, 3
Granting special privileges or immunities, see CONSTITUTIONAL LAW, 4, 5.
Denial of equal protection of the laws, see CONSTITUTIONAL LAW, 5.
Deposit of public funds by county treasurer, see COUNTIES.
Taxation for highways, see HIGHWAYS, 4, 5.
Violation of as negligence *per se*, see HIGHWAYS, 6, 7.
Homestead rights of surviving spouse, see HOMESTEAD, 3-5.
Imprisonment of minors, see INFANTS, 2.
Statutes of limitation, see LIMITATION OF ACTIONS.
Workmen's compensation act, see MASTER AND SERVANT, 2, 3.
Regulation of jitney busses, see MUNICIPAL CORPORATIONS, 3.
City ordinances, see MUNICIPAL CORPORATIONS, 4.
Maintenance of overhead crossings, see RAILROADS.
School district bonds, see SCHOOLS AND SCHOOL DISTRICTS.
Exemption from taxation, see TAXATION.

1. STATUTES (9)—EFFECT OF PARTIAL INVALIDITY. The provision of laws 1917, p. 332, forbidding certain actions against school district officers is serverable from that part of the act forbidding actions against school districts; so that failure of the title of the act to include officers does not affect the constitutionality of the balance of the act relating to school districts. *Swanson v. School District No. 15* 652

2. STATUTES (14)—SUBJECTS AND TITLES. The title to Laws 1919, p. 248, *et seq.*, referring to the "adulteration" of concentrated commercial feeding stuffs sufficiently expresses the subject-matter of § 3 (as required by Const., art. 2, § 19), which limits to ten per cent the amount of crude fiber in the feeds enumerated; since "adulteration" in the title applies to the addition of weaker or less nutritious substances and not merely to foreign substances. *Fisher Flouring Mills Co. v. Brown* 680

3. STATUTES (25)—SUBJECTS AND TITLES—SCHOOLS AND SCHOOL DISTRICTS. Laws 1917, p. 332, providing that no action shall be maintained against school districts relating to specified matters, bears a direct relation to the title, "An act relating to actions against school

Statutes—Continued.

districts"; and the generality of the title is not a valid objection to it. *Swanson v. School District No. 15* 652

4. STATUTES (34)—ENACTMENT—AMENDMENT OR INDEPENDENT ACT. Laws 1917, p. 332, changing the law relating to certain actions against school districts, being a complete and independent act without reference to prior laws on the subject, does not offend against Const., art. 2, § 37, providing that no act shall be revised or amended by reference to its title but the revised act shall be set forth in full. *Swanson v. School District No. 15*..... 652

5. STATUTES (41)—IMPLIED REPEALS. While repeals by implication are not favored, the later of two irreconcilable acts must prevail. *Swanson v. School District No. 15* 652

Stay:

Of judgment pending appeal, see APPEAL AND ERROR, 9-12.

Stipulations:

In contracts as to liquidated damages or penalties, see DAMAGES, 1, 2.

Stock:

Warranty on sale of bank stock, see BANKS AND BANKING, 4.

Street Railroads:

1. STREET RAILROADS (20)—COLLISION AT CROSSING — CONTRIBUTORY NEGLIGENCE OF AUTOMOBILE DRIVER. The driver of an automobile struck by a street car at a street intersection, was guilty of contributory negligence, as a matter of law, when it can be demonstrated that, had he looked with due care after his view was unobstructed as he testified he did without seeing any car, he would have seen the approaching car in time to have easily avoided the collision. *Heath v. Wylie* 86

2. SAME (23) — COLLISION AT CROSSING — PROXIMATE CAUSE — LAST CLEAR CHANCE. The doctrine of last clear chance does not apply where a collision between a street car and an automobile at a street intersection was caused by the contributory negligence of the driver of the automobile, and there was nothing to reasonably indicate to the motorman any purpose or lack of ability to handle the automobile with due care until after it was too late to avoid the collision. *Heath v. Wylie* 86

Streets:

See MUNICIPAL CORPORATIONS, 2-16.
Negligent use of highway, see HIGHWAYS, 6-11.

Striking Out:

Striking out pleading or matter from pleading, see PLEADING, 2.

Submission of Controversy:

To arbitrators by agreement of parties, see ARBITRATION AND AWARD.

Subpoena Duces Tecum:

See WITNESSES, 1-5.

Substitution:

On death of party, see ABATEMENT AND REVIVAL.

Supersedeas:

On appeal or writ of error, see APPEAL AND ERROR, 9-12.

Support:

Failure to support as grounds for divorce, see DIVORCE, 1.

Suretyship:

See PRINCIPAL AND SURETY.

Surveys:

To establish lost boundary, see BOUNDARIES, 4.
Of public lands, see PUBLIC LANDS.

Tariffs:

On shipment of goods, see CARRIERS.

Taxation:

For highway purposes, see HIGHWAYS, 4, 5.
License tax for operation of motor vehicles for hire, see MUNICIPAL CORPORATIONS, 2, 3.

1. TAXATION (2)—PROPERTY OF UNITED STATES—BUILDINGS AND FIXTURES ON MILITARY RESERVATION. Buildings erected and fixtures attached by a licensee at Camp Lewis under a contract with the commandant that they were to remain in case the licensee left the premises, belong to the United States and are not subject to taxation, in view of U. S. Const., art. 1, § 8, cl. 17, giving Congress exclusive legislation over places purchased for forts and other needful buildings by consent of state legislatures, and Rem. Code, § 6853, and Laws of 1917, pp. 2, 15, consenting to the acquisition of lands for military purposes and to the donation of Camp Lewis for a military reservation, and Rem. Code, § 9098, exempting from taxation all property of the United States. *Concessions Company v. Morris* 46

2. SAME (21)—SITUS OF PROPERTY—PERSONAL PROPERTY IN MILITARY RESERVATION. Personal property on the Camp Lewis military reservation is not *in* but is *without* the state of Washington, within the meaning of Rem. Code, § 9101, providing for the taxation of personal property "in" the state of Washington; and is therefore not subject to state taxation. *Concessions Company v. Morris* 46

Tender:

Effect of tender to arbitrate, see ARBITRATION AND AWARD, 2.
Of rent in unlawful detainer, see LANDLORD AND TENANT, 3.
Of purchase price for goods, see SALES, 8.
Of goods by seller, see SALES, 10.
After suit brought for breach of contract by seller, see SALES, 19.

Termination:

Of agreement for joint enterprise, see JOINT ADVENTURES, 2.

Tests:

Sampling whiskey by jury, see CRIMINAL LAW, 6, 13.

Time:

For substitution on death of party, see ABATEMENT AND REVIVAL.
For taking exceptions to instructions, see APPEAL AND ERROR, 8.
Establishment of highway by prescription, see HIGHWAYS, 1-3.
For payment of tax assessed for road improvements, see HIGHWAYS, 4, 5.
Computation of period of limitation, see LIMITATION OF ACTIONS, 2-4.
For payment for goods sold, see SALES, 8.

Title:

To sustain suit to quiet title, see QUIETING TITLE.
Of statutes, see STATUTES, 2, 3.

Tolling:

Statute of limitations, see LIMITATION OF ACTIONS, 3, 5.

Torts:

See FRAUD; LIBEL AND SLANDER; NEGLIGENCE; TROVER AND CONVERSION.
Damages, inadequate or excessive, see DAMAGES, 3.
Causing death, see DEATH.
Negligence in use of highway, see HIGHWAYS, 6-11.
Injuries caused by operation of street cars, see STREET RAILROADS.

Traffic Laws:

Violation of, see HIGHWAYS, 6.

Trespass:

By animals, see ANIMALS.

Trial:

Necessity for exceptions or objections in lower court, see APPEAL AND ERROR, 14.
Review as dependent on matters in issue in lower court, see APPEAL AND ERROR, 14.

Trial—Continued.

Review of discretionary action, see APPEAL AND ERROR, 15-17.
Review of findings in trial by court, see APPEAL AND ERROR, 19-22.
Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 23-27.
In criminal prosecutions, see CRIMINAL LAW.
Instructions in action for injuries through frightening horse by negligent driving of auto, see HIGHWAYS, 11.
Of criminal actions, see HOMICIDE.
Instructions in action for damages from collision at street crossing, see MUNICIPAL CORPORATIONS, 7, 12, 13.
Motions and grounds for new trial, see NEW TRIAL.
Amendments to conform to proof, see PLEADING, 1.

1. TRIAL (13)—VIEW—DISCRETION. It is within the discretion of the trial court to grant or deny a request that the jury be permitted to view the premises. *Jordan v. Spokane, Portland & Seattle R. Co.* 476

2. TRIAL (24)—CUMULATIVE EVIDENCE. It is largely discretionary to exclude expert evidence on the ground of want of qualification as an expert, to be disturbed only upon abuse of the discretion. *In re West Marginal Way, Seattle* 116

3. TRIAL (45-1)—ARGUMENT OF COUNSEL—SPECIAL INTERROGATORIES. Where special interrogatories are submitted under Rem. Code, § 341, counsel have a right to argue them to the jury. *Crowl v. West Coast Steel Co.* 426

4. TRIAL (55)—TAKING CASE FROM JURY—SUFFICIENCY OF EVIDENCE. On defendant's motion for nonsuit, the evidence must be viewed in the light most favorable to the plaintiff, who is not bound by unfavorable testimony of one of his own witnesses. *Johnson v. North Coast Stevedoring Co.* 236

5. TRIAL (56, 58)—TAKING CASE FROM JURY—NONSUIT. In order to sustain a nonsuit it must appear as a matter of law that there was neither evidence nor reasonable inference therefrom which would have sustained a verdict in plaintiff's favor. *Jordan v. Spokane, Portland & Seattle R. Co.* 476

6. TRIAL (64) — DIRECTION OF VERDICT — OPERATION AND EFFECT OF MOTION. There is no waiver of a jury trial, or conclusive submission of the merits of the case to the judge, where both parties moved for a directed verdict, and both motions were overruled and the case, which was purely a law case, was submitted to the jury: and the jury's verdict is as binding upon the court and parties as in any other case. *McClure v. Wilson* 166

7. TRIAL (101)—INSTRUCTIONS—REQUESTS. It is not error to refuse requested instructions fully covered in the general charge. *Johnson v. Pearson* 147

Trover and Conversion:

1. TROVER AND CONVERSION (5)—ACTS CONSTITUTING—RETAKING POSSESSION BY CONDITIONAL SALE VENDOR. The vendor in a conditional sales contract of an automobile wrongfully taking possession of the car, is guilty of a conversion. *Richardson v. Great Western Motors, Incorporated* 324

2. SAME (8)—RIGHT OF ACTION—WAIVER. The fact that a conditional sales vendee of an automobile, that had been wrongfully taken from him by the vendor, requested to be taken to it in order to get his license plates, does not constitute a waiver of his right to claim a conversion. *Richardson v. Great Western Motors, Incorporated* 324

3. SAME (11)—ACTIONS—CONDITION PRECEDENT—DEMAND. Upon the wrongfully taking possession of property, no demand is necessary as a condition precedent to an action for a conversion. *Richardson v. Great Western Motors, Incorporated* 324

4. SAME (31) — DAMAGES FOR CONVERSION — MEASURE OF DAMAGES. The measure of damages for the wrongful conversion by a conditional sales vendor is the value of the property at the time of the conversion, less the balance of the unpaid purchase price, and it would be unnecessary to plead such balance as a counterclaim or set-off. *Richardson v. Great Western Motors, Incorporated*..... 324

Trusts:

Right of trustee to sue in his own name, see PARTIES.

1. TRUSTS—EXECUTION OF TRUST—PAYMENT OF JUDGMENT. A trustee distributing a fund under a decree of court is indemnified by the order and needs no release. *Fisher v. Seattle Trust Co*..... 257

2. TRUSTS (19)—PAROL EVIDENCE TO ESTABLISH—WEIGHT AND SUFFICIENCY. The evidence to establish a trust by parol must be clear, cogent and convincing, and is insufficient, where, in a controversy between mother and son over the conduct of a business owned by them, their testimony was conflicting and indicated that a transfer of capital stock and real estate by the son to the mother was either upon consideration of the assumption of liabilities which were subsequently paid, or to avoid any judgment third parties might obtain against him. *Sewell v. Sewell*..... 252

Undue Influence:

Affecting validity of bill or note, see BILLS AND NOTES, 5.
In execution of deed, see DEEDS, 3.

United States:

Taxation of property on military reservation, see TAXATION.

United States—Continued.

1. UNITED STATES (1)—JURISDICTION—PROPERTY CEDED FOR MILITARY RESERVATION—CONDITIONS. The provision for the issuance of civil and criminal process from state courts over all tracts embraced in Camp Lewis (Laws of 1917, p. 14, § 20), does not make the absolute cession of exclusive jurisdiction to the Federal government contained in said act a conditional cession and is not inconsistent with the uses for which the property was acquired. *Concessions Company v. Morris* 46

2. SAME. The cession of jurisdiction to the Federal government of Camp Lewis which was acquired by donation, rather than by purchase within U. S. Const., art. 1, § 8, may be accompanied by such conditions as the state may see fit to annex, if not inconsistent with the use for which the property was acquired; and the Federal government acquired such jurisdiction as was ceded. *Concessions Company v. Morris* 46

Unlawful Detainer:

See LANDLORD AND TENANT, 3.

Usages:

See CUSTOMS AND USAGES.

Vacation:

Withdrawal of plea of guilty as application to vacate judgment, see CRIMINAL LAW, 1.

Of divorce for fraud, see DIVORCE, 2, 3.

Of decree distributing estate, see EXECUTORS AND ADMINISTRATORS, 4.

Of judgment, see JUDGMENT, 3.

Variance:

In action for damages for personal injuries, see DAMAGES, 4.

Under claim against city for damages, see MUNICIPAL CORPORATIONS, 17.

Vehicles:

License for operation of motor vehicles for hire, see MUNICIPAL CORPORATIONS, 2, 3.

Vendor and Purchaser:

Compensation of broker procuring conveyance, see BROKERS, 2-4.

Sale of property of decedent under order of court, see EXECUTORS AND ADMINISTRATORS, 3.

Fraud of agent in pointing out wrong land to purchaser, see FRAUD; PRINCIPAL AND AGENT, 1.

Requirements of statute of frauds, see FRAUDS, STATUTE OF, 2.

Release of party from mutual obligation to reconvey lands, see JUDGMENT, 1.

Vendor and Purchaser—Continued.

Grantees as bona fide purchasers, see MORTGAGES, 2, 5.
Transfer of mortgaged property, see MORTGAGES, 3-6.
Records as notice to subsequent purchasers, see RECORDS.
Transfers of ownership of personal property, see SALES.

Venue:

Of action against corporations, see CORPORATIONS, 1.

Verdict:

Inadequate or excessive damages, see DAMAGES, 3.
Directing verdict in civil actions, see TRIAL, 6.

Vested Rights:

Of heirs as affecting right to homestead, see HOMESTEAD, 5.

View:

By jury in civil actions, see TRIAL, 1.

View by Court:

Review as to force of evidence on view of premises, see APPEAL AND ERROR, 18.

Wages:

Of servant, see MASTER AND SERVANT, 1.

Waiver:

By appearance, see APPEARANCE.
Of conditions in policy of insurance, see INSURANCE, 1.
Of eviction by tenant, see LANDLORD AND TENANT, 2.
Of defenses in unlawful detainer, by tender of rent, see LANDLORD AND TENANT, 3.
Of lien of pledge, see PLEDGES.
Of right of action, see TROVER AND CONVERSION, 2.

Warehousemen:

1. WAREHOUSEMEN (3)—RECEIPTS—NEGOTIABILITY. A company having no warehouse of its own and doing no business for the public, organized as a device by which a bank could furnish negotiable warehouse receipts as collateral security for loans to a manufacturing company, is not a "warehouseman" authorized to issue negotiable warehouse receipts, within Rem. Code, § 3369-58, defining a warehouseman as "a person lawfully engaged in the business of storing goods for profit"; hence the bank did not acquire title by virtue of its warehouse receipt denominated on its face as negotiable; since the carrier was justified, under Rem. Code, § 3385-12, in delivering the goods to the consignee named in a nonnegotiable bill of lading. *Citizens Bank v. Willing* 464

Warranty:

Implied warranty on sale of bank stock, see BANKS AND BANKING, 4.
Parol evidence to show warranty in contract of sale, see EVIDENCE, 8.
On sale of goods, see SALES, 12-14, 24, 25.

Waters and Water Courses:

As boundaries, see BOUNDARIES, 1.
Construction of deed conveying water system, see DEEDS, 4-6.
Works for protection or improvement of lands, see DRAINS.
Floods as cause of defective sidewalk causing injury, see MUNICIPAL CORPORATIONS, 14.
Claims against city for flooding lands, see MUNICIPAL CORPORATIONS, 17, 18.
Government meanders of stream as boundary lines, see PUBLIC LANDS.

1. WATERS AND WATER COURSES (72)—ACTION FOR FLOWAGE—ACT OF GOD—EVIDENCE—SUFFICIENCY. Where floods are not unprecedented, and higher floods had occurred in prior years, they are not within the rule of nonliability as acts of God. *Neely v. Seattle*..... 266

Widows:

Rights to homestead, see HOMESTEAD, 1, 4, 5.

Width:

Of county road acquired by prescription, see HIGHWAYS, 3.

Withdrawal:

Of plea of guilty, see CRIMINAL LAW, 1.

Witnesses:

Comments and remarks of trial judge, see CRIMINAL LAW, 7-9.
Reception of expert evidence at trial, see TRIAL, 2.

1. WITNESSES (3)—SUBPOENA DUCES TECUM—RIGHT TO. A witness subpoenaed *duces tecum* cannot refuse to produce books which are shown to be material, on the ground of their immateriality, if they are not confidential or of a privileged character. *State ex rel. Spokane & Eastern Trust Co. v. Superior Court*..... 634

2. SAME. A showing that books were necessary to enable a referee to make his findings of fact and report upon an accounting and that no other source was accessible, is sufficient to justify the issuance of a subpoena *duces tecum*. *State ex rel. Spokane & Eastern Trust Co. v. Superior Court* 634

3. SAME. A witness subpoenaed *duces tecum* cannot refuse to produce the documents on the ground of their inadmissibility or of their weight as evidence. *State ex rel. Spokane & Eastern Trust Co. v. Superior Court* 634

Witnesses—Continued.

4. SAME. Noncompliance with a subpoena *duces tecum* cannot be excused on the ground of the inconvenience to the witness. *State ex rel. Spokane & Eastern Trust Co. v. Superior Court* 634

5. SAME. It is not a valid objection to a subpoena *duces tecum* to produce the books of a bank before a referee that they contain confidential communications with other parties which may be made public, since it is presumed that the referee will not permit any such improper use of the records. *State ex rel. Spokane & Eastern Trust Co. v. Superior Court* 634

6. WITNESSES (126-1)—IMPEACHMENT—COLLATERAL ISSUES. In a prosecution of a bank officer for embezzlement of a special deposit received from an executor, the executor's account filed in court is inadmissible to impeach the executor's testimony that defendant had requested him to transfer the fund to his personal checking account, as it introduced a matter foreign to the issue. *State v. Morris* 490

Work and Labor:

Contracts of employment, see MASTER AND SERVANT, 1.

1. WORK AND LABOR (4)—IMPLIED CONTRACT—RELATIONSHIP OF PARTIES—BROTHER-IN-LAW. Where a husband and wife reared an infant son of the wife's deceased sister at the instance of the brother-in-law, the relationship of the parties is not such as to rebut the presumption of an implied contract to pay for the services, and does not bar recovery without any express contract to pay, in the absence of any family relation between the parties involved. *Hendryx v. Turner* 672

2. SAME (4, 14) — IMPLIED CONTRACT—EVIDENCE—SUFFICIENCY. An action on *quantum meruit* for rearing a child is sustained by plaintiffs' evidence that they never intended to make any charge because the child had been given to them to rear as their own, until, in habeas corpus proceedings by the father, the child had been taken from them on the father's evidence that the child had not been given to them; since eliminating evidence of such gift as inapplicable, the law implies a promise to pay from the other established facts. *Hendryx v. Turner* 672

3. WORK AND LABOR (5)—SALARY—QUANTUM MERUIT. Where plaintiff was employed to superintend construction work, and the jury, on a direct conflict in the evidence, found that there was no contract as to the pay, plaintiff may recover on *quantum meruit*. *Johnson v. Pearson* 147

4. SAME (11)—PLEADING—ISSUES, PROOF AND VARIANCE. A complaint alleging the performance of special services at the special instance and request of defendant and that the reasonable value was a cer-

Work and Labor—Continued.

tain sum, states a cause of action on *quantum meruit* or implied contract, notwithstanding an allegation that defendant agreed to pay such reasonable compensation, which amounts only to a conclusion of law, and authorizes recovery without proof of an express contract. *Hendryx v. Turner* 672

Workmen's Compensation Act:

See MASTER AND SERVANT, 2, 3.

Writings:

Best and secondary evidence, see EVIDENCE, 2, 3.
Parol evidence to vary writings, see EVIDENCE, 6-8.

Writs:

See CERTIORARI; INJUNCTION; MANDAMUS; PROHIBITION.

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